

Exhibit 7

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO
3 CITY OF ALBUQUERQUE,
4 Plaintiff,
5 vs. NO: 1:19-CIV-01168-JB/JHR
6 TEVA PHARMACEUTICALS USA, INC., et al.,
7 Defendants.

8
9 Transcript of Motions Hearing before The
10 Honorable James O. Browning, United States District
11 Judge, Albuquerque, Bernalillo County, New Mexico,
12 commencing on January 24, 2020.

13 For the Plaintiff: S. Ann Saucer
14 Pia D. Salazar
 Kinzer Jackson

15 For the Defendants Teva Pharmaceuticas USA, Inc. and
16 Cephalon: Eric M. Sommer (by phone)

17 For the Defendants Johnson & Johnson, Janssen
18 Pharmaceuticals, Inc., and Ortho-McNeil-Janssen
19 Pharmaceuticals, Inc.:
 Benjamin W. Allison
 Sina Aria (by phone)

20 For the Defendants Endo Health Solutions, Inc. and
21 Endo Pharmaceuticals, Inc.:
 Eliseo Puig
 John B. Pound (by phone)

22 For the Defendant Cardinal Health, Inc.:
23 Abigail Yates (by phone)

24 For the Defendant Mallinckrodt, LLC, Mallinckrodt
25 PLC, SPEGCX, LLC, and Mallinckrodt Brand
 Pharmaceuticals, Inc.:
 Meghan Dimond Stanford

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1 For the Defendant McKesson Corporation:
Larry D. Maldegen (by phone)
2
3 For the Defendant AmerisourceBergen Drug Corporation:
Douglas A. Baker
4
5 For the Defendant Walgreens Boots Alliance, Inc.:
Mark T. Baker
6
7 For the Defendant Wal-Mart Stores, Inc.:
Brandon Myers (by phone)
8
9 For the Defendant CVS Health:
Sean Olivas
Michael Cardel (by phone)
Conor O'Croinin (by phone)
10
11 For the Defendant Gallegos: Jesse D. Hale
12
13 For the Defendants Sheth, Pacheco, Duchon, and
Woodruff: Max A. Jones
14
15 For the Defendant LeBlanc: Jessica Marshall

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1 THE COURT: All right. Good afternoon,
2 everyone. I appreciate everybody making themselves
3 available here on a Friday afternoon. Court will
4 call City of Albuquerque versus Teva Pharmaceuticals
5 USA, Inc., et al., Civil Matter No. 19-CV-01168
6 JB/JHR.

7 If counsel will enter their appearances for
8 the City.

9 MS. SAUCER: S. Ann Saucer for the City of
10 Albuquerque, Your Honor.

11 THE COURT: All right. Ms. Saucer, good
12 afternoon to you.

13 MS. SAUCER: Good afternoon, Your Honor.

14 MS. SALAZAR: Pia Salazar representing the
15 plaintiff, City of Albuquerque.

16 THE COURT: Ms. Salazar, good afternoon to
17 you.

18 MS. JACKSON: Kinzer Jackson representing
19 the City of Albuquerque, Your Honor.

20 THE COURT: Ms. Jackson, good afternoon.

21 All right. For the defendant -- if I have
22 this correct, Teva Pharmaceuticals and Cephalon,
23 Inc.?

24 MR. SOMMER: Eric Sommer on the phone, Your
25 Honor.

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1 THE COURT: Mr. Sommer, good afternoon to
2 you.

3 And then there is a whole group that I
4 believe is Johnson & Johnson, Janssen
5 Pharmaceuticals, Inc., Janssen Pharmaceutica, Inc.,
6 Ortho-McNeil, and then Janssen Pharmaceuticals, Inc.
7 I think I repeated that.

8 MR. ALLISON: Good afternoon, Your Honor.
9 Ben Allison.

10 THE COURT: All right. Mr. Allison, we can
11 find you a seat up here if you want to come on in.
12 Y'all can at least sit inside the well, if you want
13 to. Don't want to do that? Sometimes I wanted to
14 sit as far away from the judge as I could, too.

15 All right. And then for Endo Health
16 Solutions and Endo Pharmaceuticals, Inc.

17 MR. POUND: John Pound, Your Honor, on the
18 phone.

19 THE COURT: Let me start with the counsel
20 that are in the courtroom. All right?

21 MR. PUIG: Eliseo Puig, Your Honor, for
22 Endo.

23 THE COURT: And what is your name?

24 MR. PUIG: Eliseo is my first name
25 E-L-I-S-E-O. My last name is Puig, P-U-I-G.

1 THE COURT: Mr. Puig, good afternoon to
2 you.

3 Mr. Pound, are you on the phone?

4 MR. POUND: I am.

5 THE COURT: Good afternoon to you,
6 Mr. Pound.

7 Cardinal Health?

8 MS. YATES: On the phone, Your Honor,
9 Abigail Yates.

10 THE COURT: All right, Ms. Yates. Good
11 afternoon to you.

12 MS. YATES: Good afternoon.

13 THE COURT: And for SPEGCX, LLC,
14 Mallinckrodt Brand Pharmaceuticals, and Mallinckrodt,
15 LLC?

16 MS. STANFORD: Meghan Stanford, Your Honor.

17 THE COURT: All right, Ms. Stanford. Do
18 you represent anybody else. Is it that three?

19 MS. STANFORD: It's the Mallinckrodt, LLC,
20 SPEGCX --

21 MR. ARIA: Your Honor, I did not have a
22 chance to speak earlier. My name is Sina Aria,
23 counsel for Johnson & Johnson and Janssen
24 Pharmaceuticals. Apologies for that.

25 THE COURT: Say your name again?

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1 MR. ARIA: Sina, S-I-N-A. Aria, A-R-I-A.

2 THE COURT: All right.

3 All right. Ms. Stanford, do you represent
4 any individuals, or are you just the corporations?

5 MS. STANFORD: Yes, Your Honor.

6 THE COURT: McKesson Corporation?

7 MR. MALDEGEN: Your Honor, Larry Maldegen
8 on behalf of McKesson.

9 THE COURT: All right. Mr. Maldegen, good
10 afternoon to you.

11 AmerisourceBergen Drug Corporation?

12 MR. DOUG BAKER: Doug Baker for
13 AmerisourceBergen, Your Honor.

14 THE COURT: Mr. Baker, good afternoon to
15 you.

16 For Walgreens Boots Alliance, Inc?

17 MR. MARK BAKER: Mark Baker, Your Honor.

18 THE COURT: Mr. Baker, good afternoon to
19 you.

20 For the Wal-Mart Stores?

21 MR. MYERS: Good afternoon, Your Honor.

22 This is Brandon Myers on behalf of Wal-Mart.

23 THE COURT: All right, Mr. Myers. Good
24 afternoon to you.

25 For CVS Health?

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1 MR. OLIVAS: Sean Olivas, Your Honor.

2 MR. CARDEL: Good afternoon, Your Honor.

3 Michael Cardel on behalf of CVS on the phone.

4 THE COURT: Mr. Cardel, good afternoon.

5 MR. O'CROININ: Conor O'Croinin as well,
6 Your Honor.

7 THE COURT: Who?

8 MR. O'CROININ: Conor O'Croinin.

9 THE COURT: And then I think we're getting
10 into individuals now. For Michael L. Gallegos?

11 MR. HALE: Jesse Hale, Your Honor.

12 THE COURT: All right, Mr. Hale. Good
13 afternoon to you.

14 And then for Bitu Sheth, P.A., Peter
15 Pacheco, Rebecca Duchon, P.A., and Marchell Woodruff,
16 P.A.? I think those are four.

17 MR. JONES: Good afternoon, Your Honor. My
18 name is Max Jones.

19 THE COURT: Mr. Jones, good afternoon to
20 you.

21 And then Laura LeBlanc.

22 Jessica Marshall on behalf of Laura
23 LeBlanc.

24 THE COURT: Ms. Marshall, good afternoon to
25 you.

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1 Anybody else that needs to enter an
2 appearance? I think we've got some John Does.
3 Anybody else?

4 All right. Well, I pretty much got plowed
5 through all this stuff. There might be an exhibit or
6 two that I didn't get to. I think we can argue these
7 all together. I'll certainly listen to what anybody
8 wants to say.

9 When I was taking political science at Yale
10 40-plus years ago, I found out that doing nothing is
11 an option, and I really think this is probably what
12 ought to be done here. I don't think I ought to be
13 staying the case if I don't have jurisdiction. I
14 have some questions about whether I have jurisdiction
15 over this case. But I think that the MDL panel is
16 going to do something with this case, and I don't
17 think I probably should be interfering with that. I
18 am handling an MDL for the Nation right now, and
19 you've got to be careful about interfering with
20 another judge that's handling these. These are
21 complex cases and I go to the schools and conferences
22 for the people handling these MDLs. I think in the
23 past I have probably granted or at least
24 considered -- I can't remember what I did, but I
25 think I had an MDL and nobody raised concerns about

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1 me dealing with a motion to remand. I don't know if
2 that was because it was before the MDL got cranked up
3 and they were doing conditional transfers or actual
4 transfers.

5 But it seems in this posture, you know --
6 you can correct me if I'm wrong -- this thing is
7 likely to get transferred in fairly short order. It
8 doesn't seem to me I ought to be interfering with the
9 judge that's trying to do that. It seems to me that
10 if I did, I'd be putting my thumbs on the scale, and
11 I'm not sure that I really ought to be doing that. I
12 might not be handling the MDL just as the judge in
13 Ohio would handle it. But nonetheless, that's whom
14 the transfer committee has asked to handle it, and
15 he's doing it this way. And I think eventually the
16 motions to remand will have to be ruled on.

17 They do come back here. I just got one
18 products liability case from an MDL. I got it last
19 week or the week before and it's now on a trial
20 setting. So they do come back, and he may decide to
21 handle some of these motions to remand a different
22 way.

23 But it seems to me in the current posture
24 it probably should just be -- we shouldn't do
25 anything right now. I wanted to give the City an

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1 opportunity to speak, since they had requested
2 expedited review, and I have read everything. But I
3 still am of the conclusion that probably the best
4 thing to do is do nothing here. I agree with the
5 City that it wouldn't be appropriate for me to start
6 staying or entering orders if I don't have
7 jurisdiction. But I think the MDL panel will take
8 care of that, and I don't have to do anything but
9 transfer it. I think they will take care of the
10 transfer.

11 So I'm inclined just to do nothing for a
12 while. We can put a time limit on it and if the
13 transfer panel doesn't move it out quickly, then we
14 can come back to the motion to remand. But I'm
15 inclined just to not do anything at the present time.

16 But Ms. Saucer, are you going to take the
17 lead here?

18 MS. SAUCER: Yes, Your Honor, thank you.

19 THE COURT: Ms. Saucer, if you wish to
20 speak in support of your motion to remand, and if you
21 want to go ahead and address the other motions, you
22 can. Otherwise, we'll take them one at a time.

23 MS. SAUCER: I would like to start where
24 Your Honor left off and respectfully request that
25 Your Honor do take action and rule on the lack of

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1 federal subject matter jurisdiction before the JPML
2 panel. The JPML panel is set to hear, I believe it
3 is, March 26. And we are in agreement, the parties
4 in this case, that once they do hear this case, they
5 will transfer it to the Northern District of Ohio
6 where the MDL is pending.

7 The City of Albuquerque thanks Your Honor
8 for the opportunity to speak to this hearing.

9 THE COURT: But by doing that, am I not
10 sort of taking sides? I'm sort of saying that I
11 favor the plaintiffs and the plaintiffs' bar in this
12 opioid litigation and want to try to kick it back to
13 state court? I mean, isn't that sort of putting my
14 thumbs on the scale and signaling that I don't like
15 the pharmaceutical companies, I prefer the
16 plaintiffs' bar, and I'm going to help them out by
17 preempting the MDL?

18 MS. SAUCER: Respectfully, Your Honor, I
19 disagree. In fact, as a member of the plaintiffs'
20 bar, if you would write a remand motion that goes out
21 of your way to insult us, I would be perfectly happy
22 to accept that.

23 This issue here is federal subject matter
24 jurisdiction and what the United States Supreme Court
25 has said on the subject.

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1 THE COURT: But if I don't do anything, I
2 don't violate that rule. If I just sit here, it's
3 going to take care of itself. So it's not that I'm
4 violating any rule of determining jurisdiction; I'm
5 just kind of putting this one back on the back
6 burner, and there's a lot of stuff ahead of it
7 anyway.

8 MS. SAUCER: Respectfully, Your Honor,
9 there are a growing number of United States district
10 courts --

11 THE COURT: But I read those opinions and
12 there seems to be a tone to them. I mean, it seems
13 like, you know, I guess I just -- respectfully, you
14 know, it just seems a little bit of anger at the
15 pharmaceutical companies. And I guess, you know, it
16 just seems to me that everybody gets a fair shake in
17 federal court, work hard to do that, and it just
18 seemed to me those opinions seemed to have a tone to
19 them.

20 MS. SAUCER: Your Honor is free to write an
21 opinion with a completely different tone and insult
22 all of those judges and me personally. The issue
23 here really is the limits of federal subject matter
24 jurisdiction. And those limits don't have to do with
25 whether you're a plaintiff or a defendant or a

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1 pharmaceutical company or the City of Albuquerque.

2 If I may start in a somewhat different
3 location. One thing that I did not have the
4 opportunity to respond to yet is the reply brief that
5 was filed this week by the defendant in support of
6 their motion to stay. And one of the things that is
7 said in that reply brief is that the City of
8 Albuquerque has ignored these three cases which, up
9 until right now, is true. I did ignore them, there
10 wasn't any citation to a decision provided, there was
11 just a name of three cases and some numbers and there
12 was no exhibit attached.

13 Those three cases are the County of Mora,
14 the County of Rio Arriba, and the County of
15 Roosevelt. And the defendant has particularly taken
16 issue with the fact that the City of Albuquerque has
17 not responded.

18 I'd like to respond now, if I may. In one
19 of those three cases, the County of Rio Arriba, the
20 reason why the district court judge did not grant the
21 motion to remand is because there was none filed. I
22 actually happen to have the docket sheet for that
23 case, if the Court would like it.

24 THE COURT: Who is the judge on that?

25 MS. SAUCER: So the judge on the Rio Arriba

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1 case: Assigned to Magistrate Judge Jerry H. Ritter,
2 referred to Magistrate Judge Karen B. Molzen. And
3 there was no remand motion decided or granted because
4 the plaintiffs were happy, apparently, to be in the
5 federal MDL Court. Your Honor --

6 THE COURT: It seems to me that probably
7 the more persuasive case would be -- I think it's
8 Judge Herrera that has -- with the state case did go
9 ahead and grant the motion to remand, and I guess my
10 question on that is again probably what your docket
11 sheets are saying. At the time that she granted
12 that, where was the MDL procedure? Had there been a
13 conditional transfer order at that point?

14 MS. SAUCER: The argument was made in that
15 case --

16 THE COURT: That it was coming; right?

17 MS. SAUCER: Well, actually --

18 THE COURT: There wasn't any MDL action at
19 the time that she made her motion to remand, was
20 there? Or her opinion remanding?

21 MS. SAUCER: I don't know that that is
22 correct, Your Honor. It may have been that there --

23 THE COURT: I could be wrong on it.

24 MS. SAUCER: Well, because in the course of
25 the opinion, and we quote the language, the Court

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1 references the argument by Attorney General Hector
2 Balderas in which he specifically says there is no
3 point to bouncing cases between two federal courts
4 that lack subject matter jurisdiction over the
5 claims.

6 THE COURT: I saw that, but I didn't think
7 at the time -- and you know, I didn't go back -- and
8 I should have -- and look at my own work in the past.
9 But I think I had a situation just like Judge
10 Herrera, where everybody was talking that there might
11 be an MDL, but there wasn't an MDL yet.

12 MS. SAUCER: Yes, Your Honor did.

13 THE COURT: That's the difference, I think,
14 between where Judge Herrera was when she granted her
15 motion to remand and where I am. And I think I've
16 been where she has been before, and you know, you've
17 got to do your work, you have a motion to remand,
18 people are talking about an MDL, but it's not there
19 yet. It seems to me that's a different situation, if
20 I'm understanding where she was on the opinion and
21 where I was in the past.

22 MS. SAUCER: I believe that I have it at my
23 desk, and if I have a rebuttal, I will look at it.
24 But --

25 THE COURT: I'll give you rebuttal. I

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1 don't kick anybody out.

2 MS. SAUCER: No, I believe that it was
3 either -- here it is conceded by both parties,
4 everyone agrees that once the JPML panel reaches this
5 case, which I believe they will on March 26, that
6 they will -- there is already a CTO and they will
7 transfer it, and that was conceded by Judge Herrera.
8 Your Honor, I have some materials about the coming --

9 THE COURT: You could be right. I just
10 didn't know if hers was as advanced as where our case
11 is, the City of Albuquerque case is. Do you think it
12 was?

13 MS. SAUCER: I do, in all material
14 respects. And I guess that's because the CTOs are
15 granted pretty early in the case.

16 And if I may talk about the County of Mora,
17 because Your Honor is correct. You just said at the
18 time of the County of Mora case, the motion was on
19 file to create the JPML and it had not been granted
20 yet. And the County of Mora is one of the three
21 decisions that the City has not responded to yet that
22 I would like to take the opportunity to respond to
23 now. There is more than one thing that distinguishes
24 that case, not just the fact that there had been no
25 decision yet to create a panel. It was in 2017.

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1 There had been no decision yet to create the MDL, and
2 there certainly was no known -- if it were to be
3 created, where it would go, where the case would go.

4 One of the things about the case, though,
5 is that a suggestion of bankruptcy was filed in that
6 case on behalf of a defendant who is not here. Here
7 Purdue filed for bankruptcy, but the City of
8 Albuquerque got them out of the case in state court
9 before that became any type of jurisdictional issue.

10 The docket sheet in the County of Mora case
11 which was before Your Honor says in the right-hand
12 corner, "Bank stay, closed." So there was a
13 bankruptcy issue, and a suggestion of bankruptcy that
14 is not before the Court today.

15 Moreover, and I think this is more to Your
16 Honor's overarching concern, which is, you know, in
17 the past these cases were transferred, all of these
18 cases were transferred; why don't I just transfer --
19 I mean, why don't I just sit here and let it be
20 transferred? Nothing forces me to take action.

21 The reason why the City of Albuquerque asks
22 that Your Honor respectfully change your mind on
23 this, it actually goes back to the County of Mora
24 case. In the County of Mora case, I have the briefs
25 filed by the defendants. And what they said to the

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1 Court over and over again is: Don't do anything
2 because this stay is going to be brief. Brief,
3 brief, brief, brief. May I approach the bench?
4 Would the Court like to see?

5 THE COURT: You may. I mean, I think what
6 they're saying -- you know, they can speak for
7 themselves -- I think they're saying it's going to be
8 brief in this case, that it's not going to be
9 necessarily brief in the MDL. I agree with you, once
10 it goes to the MDL -- I can't remember the docket
11 number I have on my MDL, but it's getting on up
12 there, you know, and I know that it will be delayed.
13 I would assume that the Ohio judge is probably going
14 to come up with some procedure on these remands,
15 don't you?

16 MS. SAUCER: Not anytime soon, Your Honor.
17 Absolutely not.

18 One of the things that -- so County of Mora
19 was allegedly briefed in 2017, and here we are in
20 2020. And one of the things that has happened in
21 other cases where the Court sided with the defendants
22 is, the plaintiffs failed to file the orders from
23 that MDL, the proposed transferring court. Here we
24 filed those orders. One of them is a flat-out
25 moratorium on remand motions. The other one is CMO

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1 number 1, which flatly says that you're not allowed
2 to file anything. It makes a carve-out -- and this
3 is an important point -- for states. One of the
4 things the defendants have said is, "Oh, look, here
5 we have three decisions where the MDL court has ruled
6 on federal subject matter jurisdiction," but that
7 does not apply to a county or a city.

8 THE COURT: Well, the bottom line on
9 this -- correct me if I'm wrong -- it's got my
10 initials on it, so I have a vague memory of this
11 case. It's like you said; there wasn't a motion to
12 remand in this case; right?

13 MS. SAUCER: Oh, no, I'm sorry, there was
14 in that one. There wasn't in the Rio Arriba, Your
15 Honor. In that one, there was a motion to remand,
16 although it was another plaintiff's firm and they
17 didn't do a particularly good job. In fact, one of
18 the potshots taken by the defendants there is at one
19 point in the briefing they used the wrong client's
20 name.

21 THE COURT: But this one got transferred?

22 MS. SAUCER: It got transferred and it's
23 been sitting there since 2017, and now we're in the
24 year 2020.

25 THE COURT: What happened to the motion to

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1 remand in this case?

2 MS. SAUCER: Nothing. Nothing.

3 THE COURT: Well, I know. But what
4 happened in my court?

5 MS. SAUCER: It got transferred without it
6 being ruled on, is my understanding. But I'm not
7 sure if that's because --

8 THE COURT: I think it was with me a
9 nanosecond. I remember this thing coming in and I
10 was kind of excited about it. Then it's gone.

11 MS. SAUCER: But it looks to me like the
12 suggestion of bankruptcy had something to do with
13 that.

14 THE COURT: Could have been. I don't
15 remember that. It seemed like they might have
16 cleared that out like you did, but I don't remember.
17 I don't remember. It wasn't with me long, I remember
18 that.

19 MS. SAUCER: If I may speak to Your Honor's
20 comment a moment ago that, well, they said the stay
21 would be brief, but they weren't talking about
22 overall; they were talking about just in this Court.

23 THE COURT: Well, it's going to be brief
24 here.

25 MS. SAUCER: Yes, that's right.

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1 THE COURT: It's not going to be brief in
2 the MDL. We can all agree with that; right?

3 MS. SAUCER: That's true. But this is a
4 very relevant point according to Newman-Green.

5 So getting to the remand motion and the
6 first argument made, which is basically: We admit
7 we've only removed on diversity. We admit that on
8 the face of this, there is no complete diversity of
9 citizenship, which has been a requirement since the
10 Supreme Court opinion in, what, Strawbridge versus
11 Curtis. There's one plaintiff which is deemed to be
12 a citizen of New Mexico for the purposes of
13 diversity, and there are seven New Mexico defendants
14 in two defense categories, not just from prescribers,
15 but also a pharmacist. So two categories of seven.
16 So complete diversity is destroyed seven times over.
17 They're seven times wrong on their complete diversity
18 argument. But they say, "Oh, it's okay," because
19 even though there is no complete diversity in the
20 face of this, when we filed a notice of removal, Your
21 Honor can retroactively -- or some other federal
22 judge can cure that by severing it after the fact.
23 So when we removed it, it didn't exist; but if you
24 fix it for us, and then pretend that that fix existed
25 when we removed it, then we removed it properly.

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1 This has been rejected across the country,
2 and here's why. The excuse for this is the
3 Newman-Green decision decided by the United States
4 Supreme Court. And the courts that have looked at
5 that have noticed the Supreme Court in that case --
6 the case was before the Seventh Circuit; I think it
7 was Judge Easterbrook -- said, "Hey, wait. There's
8 no federal subject matter jurisdiction."

9 And the plaintiff said, "Oh, no. Well,
10 we'll dismiss whoever we need to dismiss," because as
11 a plaintiff, you can't get a judgment from a court
12 that doesn't have any federal subject matter
13 jurisdiction. That's worthless. So the plaintiff
14 said, "Please, Judge Easterbrook, let us dismiss this
15 so that we fix the jurisdictional defect that you've
16 noticed for the first time on appeal. And the
17 Supreme Court said you could do it." But the Supreme
18 Court said this can only be done sparingly and the
19 Court has to look at whether a party will be
20 prejudiced.

21 And so this is why it's relevant that if
22 this case is shipped off to a federal court in Ohio,
23 the City of Albuquerque will be prejudiced. The
24 Supreme Court said the Court has to look at whether a
25 party will be prejudiced. That's what the Supreme

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1 Court said was a requirement for this retroactive
2 time travel -- you know -- trick; that it's wrong
3 when we did it, but, hey, Judge, you can make it good
4 now.

5 And the defendants have no -- looking at
6 their remand briefing, they have no real response to
7 that, Your Honor. Their response to the fact that
8 the United States Supreme Court in Newman-Green said
9 this trick only -- they didn't call it a trick.
10 Sorry, I'm paraphrasing. But it only works if the
11 Court has ascertained that no one is prejudiced. And
12 the Tenth Circuit has the same reading in the Tenth
13 Circuit case we've cited for Your Honor as well. The
14 only response the defendants have is to cite these
15 three cases: The Sullivan, the Cook-Bates case, and
16 another case -- is it Mayfield?

17 Here's the thing. If Your Honor looks at
18 everything that's cited in the defendants' remand
19 brief, all of it is a completely inapposite body of
20 case law. The three cases they cite, the Sullivan
21 case, the Cook case, the third case -- I think it's
22 Mayfield -- those cases are completely different.
23 They're about plaintiffs trying to link in the same
24 case their complaint about a thing with their
25 complaint about an action. They're plaintiffs -- and

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1 actually plaintiffs usually can do this, but anyway,
2 a couple cases they can't, including the ones the
3 defendants have marshaled here, where the plaintiffs
4 have filed a products liability case and they're
5 complaining about the thing, and they marry it with a
6 case against the doctors. And a couple courts have
7 said, "No, that's different."

8 That is the only response that the
9 defendants have. All of their cases on pages 6 to 10
10 of their remand briefing fall into that category
11 where they're talking about Rule 19 and joinder,
12 they're talking about cases where the plaintiffs were
13 marrying together in one litigation a complaint about
14 the thing with a complaint about the action.

15 That's completely different here. Here we
16 have a situation where there is one public nuisance,
17 and the City of Albuquerque -- as have municipal
18 governments all over the country, unable to deal with
19 this deadly -- the worst man-made medical catastrophe
20 in our times, where people are dying -- the City of
21 Albuquerque is one of many municipal governments from
22 coast to coast that have said, "It's our duty, our
23 responsibility, to protect the health, safety, and
24 welfare of the citizens in the city, and we don't
25 have the resources to do it. And this is a play.

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1 And we are going to use the common law action of
2 abatement, abatement of a public nuisance," which
3 looking at cases in which municipal governments have
4 sued, public nuisance is a standard, it's a very
5 frequently recognized role of local governments where
6 the community is suffering, to come and abate the
7 public nuisance.

8 And the defendants -- where I'm going with
9 this is that none of these defendants, with the
10 exception of two cases out of West Virginia that have
11 since been repudiated with a "but see" cite, with the
12 exception of that, they cannot cite a single decision
13 in which a government entity sued to abate a public
14 nuisance in an opioid case or even any other case,
15 and the Court said, "You can't try your case in one
16 jurisdiction. You have one public nuisance and
17 you've got to break it up and you've got to file one
18 case in federal court and one case in state court."

19 And what are the defendants going to do?
20 They are going to blame the empty chair, and that's
21 the prejudice. That's the prejudice. And the hook
22 for this, the excuse for this, for allowing federal
23 subject matter jurisdiction and diversity grounds on
24 the face of this seven times over, there is no
25 subject matter jurisdiction. The excuse is: Sever

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1 it and pretend that the removal was proper at the
2 time. And again, Newman-Green is the excuse; that
3 requires no prejudice.

4 Here, of course, the City is going to be
5 prejudiced by the delay, but it's also going to be
6 prejudiced if it's forced to try one public nuisance,
7 one harm. I mean, there is one damage model for
8 this, but they've got to try the case in two
9 jurisdictions. So it can't be consolidated for any
10 purpose. So they're in federal --

11 THE COURT: Well, if it's going to be
12 tried, it's going to be tried by me; right?

13 MS. SAUCER: Part of it. I mean, if they
14 have their way, though --

15 THE COURT: I mean, the pretrial
16 proceedings will be done in Ohio, but I'm going to be
17 the one that's going to try the case, if it's going
18 to be tried.

19 MS. SAUCER: But under their theory,
20 though, the Court can't do it because they removed as
21 the case is filed. What the Court has to do is let
22 seven of these defendants go. One of them is in the
23 category of the pharmacy defendants, and then
24 everybody who is in the category of the prescribers.

25 THE COURT: Well, we'll see. We'll see

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1 what they do in Ohio. They may surprise you. They
2 may say these cases that have defendants like you've
3 joined in this case, federal court doesn't have
4 jurisdiction over them, and that will knock out a
5 whole bunch of transferred cases.

6 MS. SAUCER: Your Honor, the federal court
7 in Ohio won't rule. The federal court in Ohio will
8 not even allow us to make this --

9 THE COURT: Well, right now, he's trying to
10 get a handle on a rather large number of cases. But
11 he'll get around to it.

12 MS. SAUCER: Your Honor, it is true, there
13 is a large number of cases, and the scope of that --
14 the scope of that MDL has grown in terms of
15 categories of defendants.

16 THE COURT: You're helping it to grow;
17 right?

18 MS. SAUCER: Well, plaintiffs' lawyers who
19 want to avoid the prejudice that's going to happen at
20 trial if the defendants are allowed to point to an
21 empty chair and blame -- I mean, I'm familiar with --

22 THE COURT: When I go to these conferences,
23 it's usually the defendants that are complaining
24 about MDLs. They think that the MDLs are favoring
25 the plaintiffs' bar.

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1 MS. SAUCER: Your Honor, thank you. Write
2 that remand decision. Say, "I don't like the
3 plaintiffs' bar, the defendants don't like MDLs. I'm
4 remanding the City of Albuquerque's case."

5 THE COURT: I don't dislike plaintiffs'
6 bars.

7 MS. SAUCER: Well, okay, I'm so sorry. I
8 didn't mean to say that. I was just trying to be
9 funny, and so frequently I fail. I'm sorry.

10 What I meant to say was, earlier the Court
11 expressed a concern that every single -- and I just
12 want to say this again. Every single court that has
13 ruled on this has ruled in our favor with the
14 exception of these outlier West Virginia cases that
15 hinged on West Virginia law and now have been "but
16 see" cited.

17 THE COURT: You can tell me if I'm wrong.
18 It would seem to me that most judges are doing what
19 I'm doing, probably sitting on their hands and
20 letting the MDL process -- and you've got a handful
21 of judges that you persuaded to get in there and do a
22 remand back to state court before the MDL can do
23 anything. So yes, you have some cases, but the
24 overwhelming number of cases are being transferred.

25 MS. SAUCER: Your Honor, we have a trend.

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1 And -- okay, so let me --

2 THE COURT: You've got a handful of judges,
3 is the way I'd describe it. You've got some judges
4 who are wanting to be active in sending some of these
5 cases back to state court. But the overwhelming
6 number of cases are moving. They're moving to the
7 MDL.

8 MS. SAUCER: Your Honor, can I break that
9 down? Because I think --

10 THE COURT: Hundreds. You've got 12
11 decisions scattered across some judges that are doing
12 remands. But you literally have got hundreds of
13 these cases moving to the MDL.

14 MS. SAUCER: In many of those cases, in 33
15 percent of the cases that the defendants have chosen
16 to talk about here, there was no motion to remand
17 even filed. So to look at a list, that really
18 doesn't answer the question, because the question is:
19 Where a plaintiff has said to the Court there is no
20 federal subject matter jurisdiction, and where the
21 plaintiff has proven, as we have here, that the
22 federal MDL court will not even allow us to say to
23 this Court there is no federal subject matter
24 jurisdiction, and where we're trying to abate a
25 public nuisance that is deadly where the scourge of

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1 opoid abuse and death is something that the City of
2 Albuquerque needs resources and is trying to abate
3 this public nuisance and avail itself of the state
4 court system, which Albuquerque is allowed to do, and
5 this trick of removing these cases without any basis
6 so that they can be stuck in a court that won't even
7 allow us to say to the Court there is no federal
8 subject matter jurisdiction -- that is prejudicial.

9 And the growing -- but to break down the
10 cases, yes, there are thousands of cases in the MDL.
11 Many of these plaintiffs want to be there. I mean,
12 many of them, they file them, they have reasons for
13 filing them in the district court where the plaintiff
14 is. Some of them have to do with they're familiar
15 with those state laws and there is an issue for an
16 MDL, which law. And so where you file your case --
17 and so many of these plaintiffs decide to file it and
18 let it be transferred, and they never file a remand
19 motion. And then you just have the effect of time.

20 Then you have the courts that -- so some
21 of -- they stay decisions they cite. And again, they
22 have nothing in their favor other than these
23 idiosyncratic two West Virginia cases that have since
24 been repudiated by their own "but see" cite. Other
25 than that, they have no judge that's looked at this,

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1 no one, and said that if you are a public
2 governmental entity and you are suing to abate the
3 scourge of opoid abuse and addiction in your
4 community, that you have to do that in two different
5 jurisdictions in two different cases: In state court
6 against the in-state defendants and in federal courts
7 against the federal defendants so that in these
8 different trials in these different cases, they can
9 point the finger at one another.

10 They have no decision on the merits. They
11 have this argument of, look, all these cases ended up
12 in the MDL. The thing is, though, that as time has
13 gone on, the courts that have looked at this have
14 said it's wrong. This is a public health and safety
15 issue by a local governmental entity.

16 THE COURT: That's what makes me
17 uncomfortable about saying it's wrong. I mean, that
18 seems to me to be taking sides. When you read those
19 opinions, it just makes me a little uncomfortable
20 saying it's wrong. I mean, it seems to me that it's
21 not yet time to say that.

22 MS. SAUCER: Okay. Then do not say that.
23 How about: The United States Supreme Court in the
24 Syngenta opinion and in other opinions, a long list
25 of Supreme Court opinions, has said that subject

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1 matter jurisdiction is -- it's the first primary
2 issue. Because without federal subject matter
3 jurisdiction, a Court cannot act at all. And to
4 respect -- to be, in fact -- one could argue in
5 addition to the fact that defendants complain about
6 MDLs and don't like them, one could argue that it's
7 the conservative thing to do to respect the limits of
8 federal subject matter jurisdiction as those limits
9 have been repeatedly promulgated and stated and
10 explained by the United States Supreme Court.

11 So Your Honor, just don't write a decision
12 that likes plaintiffs or that says that anybody is
13 wrong. It can be the Supreme Court has said federal
14 subject matter jurisdiction is the primary issue,
15 because without it, federal courts cannot act. And
16 then say there are seven New Mexico defendants and
17 one New Mexico plaintiff. Removal statutes are
18 strictly construed. The defendants have the burden.
19 Again, that's all controlling law, all the
20 controlling standards say that. Every Court that's
21 looked at this, except for these two outliers that
22 have since been distinguished even in West Virginia,
23 has said that this theory of federal subject matter
24 jurisdiction is wrong, that their theory, their
25 subject matter jurisdiction arguments are clearly

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1 wrong. They're clearly wrong because a plaintiff is
2 allowed to and, in fact, should sue all the culpable
3 defendants in one case so they cannot point the
4 finger at the empty chair.

5 Here again, all the Courts that have looked
6 at this have said this, that we have a scourge of
7 these dangerously addictive drugs and there was a
8 closed system that's set up, and the closed system
9 failed. And there are four different categories of
10 defendants: The manufacturers, the wholesale
11 distributors, the pharmacies, and the prescribers.
12 And here we have New Mexico defendants destroying
13 complete diversity in two of those categories. We
14 have a pharmacist, Michael Gallegos, and then we have
15 six New Mexico -- heavy New Mexico opioid
16 prescribers. And every court that has looked at this
17 has agreed, yes, you can sue all of the defendants in
18 the supply chain. It's the same public nuisance that
19 you're trying to abate. We don't break up nuisance
20 abatement cases and have one in federal court against
21 one group and one in state court against another
22 group. Which is -- again, that is their theory that
23 they admit there's no complete diversity. They admit
24 there's no complete diversity seven times over, but
25 they say, "Well, break up the case," so the City of

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1 Albuquerque is in state court against these seven
2 defendants and they're going to blame the others that
3 are in federal court. Meanwhile, in federal court,
4 they'll blame all the others that are in state court.

5 And no court that has looked at this has
6 said that that theory of federal subject matter
7 jurisdiction has any validity. And literally nothing
8 that the defendants have cited is comparable. If
9 Your Honor looks at their cases in their remand
10 motion, they're all of these cases.

11 Can we talk about the Temple case? That's
12 a case from the United States Supreme Court. It was
13 decided in the year 1990. Can we talk about that
14 case? That case is cited by the defendants for the
15 proposition that, well, under Rule 19, joint
16 tortfeasors are not indispensable. What happened in
17 that case, it was a case about a bone screw plate
18 screwed into someone's spine. Bad idea. Never do
19 that. Didn't end well.

20 The plaintiff sues the manufacturer of the
21 plate and the screw. The defendant says, "You can't
22 sue me because you haven't added the doctor who put
23 it in and the hospital where you got it." They
24 didn't third-party them; they just said, "The case is
25 defective."

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1 The Fifth Circuit agreed, so the case was
2 dismissed because there was only one manufacturer
3 defendant in it. And the U.S. Supreme Court said,
4 No, you can't dismiss a case because of that."
5 That's their case. That's what they're relying on,
6 the United States Supreme Court saying it's not
7 grounds for dismissal that these other defendants
8 aren't there where the defendant didn't rouse himself
9 to third-party them anyway. That's the Temple case.

10 That has nothing to do with this. It has
11 nothing to do with a public entity trying to abate
12 the same public nuisance in one courtroom in one
13 jurisdiction to prevent the defendants from pointing
14 the finger of blame against those that are not before
15 the Court.

16 We're not asking that Your Honor take
17 sides. We're not. We're pointing to the law. We're
18 pointing to what the Supreme Court has said. We're
19 pointing to the standard that removal statutes are
20 strictly construed. And not to act is an action,
21 because not to act means that the City of Albuquerque
22 will be sitting there for years and years in the
23 future without the ability to be before a court with
24 jurisdiction over their claims to seek relief to
25 abate this crisis. To not act will doom the City for

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1 years without any ability to even make their
2 arguments in a court that has subject matter
3 jurisdiction over the claims. Inaction is a
4 decision, respectfully, Your Honor.

5 THE COURT: All right. Anything else you
6 want to say on your motion to remand?

7 MS. SAUCER: No, Your Honor.

8 THE COURT: All right. Thank you,
9 Ms. Saucer.

10 All right. Let me make -- is it Mr. Puig?

11 MR. PUIG: The way that I explain it, Your
12 Honor, is "wig" with a P in front of it.

13 THE COURT: All right.

14 MR. PUIG: Thank you for inviting us to
15 your courtroom today, Your Honor. I'm going to start
16 where Your Honor started, which is, yes, you're
17 absolutely right. The course here, the best course
18 here, is for Your Honor to either grant the motion to
19 stay or otherwise defer ruling on the remand motion
20 and allow this case to transfer to the MDL.

21 There are four reasons why it's important
22 to do that. Number one, in substantially similar
23 opioid lawsuits removed to this Court on identical
24 jurisdictional grounds; not similar -- identical
25 jurisdictional grounds.

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1 THE COURT: Are these theories that the
2 City of Albuquerque is bringing in this case of a
3 public nuisance, is that something that is common to
4 a large number of cases that are being brought?

5 MR. PUIG: The vast majority of opioid cases
6 are brought by cities and counties against
7 distributors, manufacturers, and retailers, retail
8 pharmacies, and they allege public nuisance among
9 other claims.

10 But Your Honor, to ensure consistent
11 treatment of the opioid cases that have been removed
12 to this Court on, again, not similar but identical
13 jurisdictional grounds, this Court should again defer
14 remand of the pending remand motion.

15 Second, Your Honor, federal district courts
16 around the country, including the District of New
17 Mexico, have repeatedly recognized and applied a
18 general rule that district courts should defer ruling
19 on pending remand motions in cases bound for an MDL
20 to allow the JPML to render a final decision on
21 transfer.

22 Third, the interests that undergird the MDL
23 system in this case, including uniform treatment of
24 like legal issues and the promotion of judicial
25 economy and efficiency, are both furthered if Your

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1 Honor defers ruling on a remand motion in this case.

2 And fourth and finally, the balance of
3 hardships in this case uniformly favor a stay.

4 So I'm going to take each of those
5 arguments in turn, Your Honor, and respond to some
6 things that plaintiff's counsel said as I go.

7 THE COURT: Let me ask, since the City
8 argued their motion to remand, it does seem to me
9 that the jurisdictional basis for this motion -- for
10 this case is suspect. I mean, I didn't see a lot of
11 argument that the pharmaceuticals and these seven
12 individuals could not be -- there were not causes of
13 action, viable causes of action, against every
14 defendant that's here. Would you agree with that,
15 that this isn't a fraudulent joinder issue in which
16 the people that have been named as individuals, the
17 City has stated causes of action against them?

18 MR. PUIG: I'm not here to say anything
19 about the causes of action or the viability of the
20 causes of action.

21 THE COURT: But if you're not doing that,
22 you're telling me basically that there is not
23 fraudulent joinder here.

24 MR. PUIG: Oh, we didn't assert that there
25 was fraudulent joinder, Your Honor.

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1 THE COURT: That's all I'm asking.

2 MR. PUIG: We asserted three legal
3 doctrines with which this Court is incredibly
4 familiar because he has addressed them at length in
5 two decisions and adopted the doctrine, though he
6 didn't apply it on the facts.

7 THE COURT: But I guess my point is that at
8 least fraudulent joinder we can put aside.

9 MR. PUIG: We're not arguing fraudulent
10 joinder, Your Honor.

11 THE COURT: These, unlike a lot of times
12 when I have a motion to remand, they're saying, well,
13 they shouldn't have sued this employee and created a
14 nondiverse situation. That's not this case.

15 MR. PUIG: Right. As Your Honor
16 explained --

17 THE COURT: So for me to get jurisdiction
18 over this case or some judge to get jurisdiction,
19 they're going to have to do something.

20 MR. PUIG: They're going to have to apply
21 the Doctrine of Procedural Misjoinder.

22 THE COURT: Which I have recognized.

23 MR. PUIG: Right.

24 THE COURT: I know the plaintiffs don't
25 like it.

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1 MR. PUIG: Right.

2 THE COURT: They use all sorts of
3 derogatory terms about it. But I've never also used
4 it.

5 MR. PUIG: You've never applied it, but
6 that is because --

7 THE COURT: Never applied it.

8 MR. PUIG: -- because of the facts of the
9 case.

10 THE COURT: It's rarely used, isn't it?
11 It's recognized, but it's rarely used.

12 MR. PUIG: Your Honor, I submit if there is
13 a case --

14 THE COURT: You think this is it?

15 MR. PUIG: If you're going to see a case
16 where procedural misjoinder is appropriate, let me
17 tell you something, Your Honor, this is the one.

18 THE COURT: Tell me why.

19 MR. PUIG: So I'm going to turn to the
20 remand argument, I guess. I still have several
21 things I want to say about the stay issue.

22 THE COURT: I know. I'm kind of interested
23 in this remand.

24 MR. PUIG: So Your Honor, it's important to
25 call a spade a spade in this case. And the fact of

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1 the matter is, we have a situation in this case that
2 we have seen all over the country in opioid cases,
3 and that is plaintiff lifting a form opioid complaint
4 that has been filed in dozens of other cases, if not
5 hundreds of other cases, but because this case was
6 filed in New Mexico, they have tacked on claims
7 against local doctors, including threadbare and
8 unrelated allegations of wrongdoing.

9 Under well-established law which Your Honor
10 has recognized in circumstances like this when a
11 plaintiff brings distinct claims and unrelated
12 allegations of wrongdoing against nondiverse
13 defendants to deprive a defendant who is diverse of a
14 federal forum, especially when there is an MDL
15 involved, the Court can and should drop these
16 defendants to preserve diversity jurisdiction.

17 And Your Honor, before I get into the
18 jurisdictional merits of the argument, I think it's
19 incredibly important that we spend some time briefly
20 looking at this complaint, and that's for two
21 reasons.

22 First, as Your Honor recognized and
23 explained at length in Flores-Duenas, the Doctrine of
24 Procedural Misjoinder exists for a purpose, and that
25 purpose is to prevent clever plaintiffs' attorneys

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1 from abusing procedural rules to deny diverse
2 defendants a federal forum to which they would
3 otherwise be entitled. And I will submit to you,
4 Your Honor, if you take a cursory look at this
5 complaint, it will be abundantly clear to you that
6 that is precisely the game that is afoot in this
7 case, and it provides important context to the
8 jurisdictional analysis.

9 THE COURT: Well, but you will agree with
10 me that joinder in the federal courts is extremely
11 broad, and I've always had trouble finding the limits
12 of it, and have not been very happy with treatises or
13 other cases trying to define when there is
14 misjoinder. So you end up with a situation that
15 involves opioids, probably it's very difficult to say
16 that it's not the same subject matter or transaction
17 or series of transactions. So you're really pushing
18 the limits to get the Court to say that this is the
19 one case that you have a misjoinder.

20 MR. PUIG: Well, I think, Your Honor, if we
21 take a look at the allegations, which brings me to
22 the second reason why I think it's important to
23 review the complaint with Your Honor, Your Honor has
24 adopted the Procedural Misjoinder Doctrine, which, by
25 the way, is different than the Rule 1921 tributary of

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1 the severance argument that we also address in our
2 notice of removal and motion to remand. I didn't
3 hear much of a distinction made in that arena with
4 respect to plaintiff's counsel's argument, but there
5 are definitely two separate doctrines that we're
6 looking at here today.

7 But it's important, as Your Honor
8 demonstrated in Flores-Duenas and Ullman that you
9 actually look at the facts of the case. So let's do
10 that, Your Honor. Let's look at what this complaint
11 actually alleges about these nondiverse defendants.

12 And first of all, Your Honor, when I said
13 that this was a form opioid complaint, I wasn't
14 making that accusation idly. I know that because I
15 have seen this complaint many, many times in my two
16 and a half years of working on jurisdictional issues
17 in opioid cases. This complaint is actually a
18 complaint that is typically filed in federal court.
19 And it typically only names -- surprise --
20 manufacturers, distributors, and pharmacies.

21 If you're wondering how there is typically
22 subject matter jurisdiction for this complaint, it's
23 because it typically includes a RICO claim, which the
24 plaintiffs in this case have obviously removed.

25 And I want to make something really clear

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1 here, Your Honor. When I say that the complaint is
2 lifted, I don't mean that it names generally the same
3 parties and includes generally the same allegations.
4 I mean chapter and verse, entire sections and
5 paragraphs, to the tune of 95 percent of this
6 complaint, are lifted directly from other opioid
7 lawsuits filed in other states against the same core
8 group of defendants but not naming medical provider
9 defendants. Curiously, Your Honor -- well, not
10 curiously, but this complaint includes something
11 called a "Preliminary Statement," like most
12 complaints do. If you look at paragraph 1 -- and by
13 the way, Your Honor, do you have a copy of the
14 complaint?

15 THE COURT: I don't have it with me.

16 MR. PUIG: Would you like one? I've got
17 one right here. May I approach?

18 THE COURT: You may.

19 MR. PUIG: Here you go, Your Honor. If you
20 look at the section of the complaint entitled
21 "Preliminary Statement," you see sections in
22 complaints like this all of the time. And the
23 purpose of a preliminary statement is to frame the
24 lawsuit, describe the allegations, list the parties,
25 et cetera.

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1 Paragraph 1 of this complaint describes and
2 identifies a category of defendants called the
3 manufacturer defendants. It goes on to list them and
4 characterize the allegations against them as being
5 they engaged in a deceptive marketing campaign with
6 respect to opioid products.

7 Paragraphs 2 and 3 describe in sequence the
8 distributor defendants and then the pharmacy
9 defendants, and describe the misconduct purportedly
10 committed by these defendants which can be broadly
11 generalized as failing to notice and report
12 suspicious orders and prescription of opioid
13 products.

14 Then paragraph 4 of the complaint ties it
15 all together and says, "The City brings this action
16 to redress defendants' campaign of unfairly,
17 deceptively, and fraudulently marketing, promoting,
18 and distributing opioids."

19 If Your Honor takes the time to read the
20 rest of the 16 paragraphs that form the preliminary
21 statement, noticeably absent will be any discussion
22 of the nondiverse defendants or the conduct in the
23 case.

24 I want to turn your attention to page 6.
25 Again, not uncommon in many complaints, this

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1 complaint has a section that lists the parties.
2 You'll notice that plaintiff has listed on page 6,
3 including jurisdictional recitals, then you'll notice
4 that they start to list the defendants on page 7,
5 first listing the manufacturer defendants, then on
6 page 11 listing the distributor defendants, then on
7 page 4 listing the pharmacy defendants. There is no
8 mention of the nondiverse defendants in the section
9 of the complaint that purports to list the parties
10 named as defendants. And again, Your Honor, that is
11 because this is a sloppy, lifted complaint from other
12 opioid actions which the plaintiffs transparently
13 tacked on nondiverse defendants for the purpose of
14 defeating diversity jurisdiction.

15 So let's look at what the complaint
16 actually says about the nondiverse defendants.
17 They're mentioned a grand total of three times. The
18 first is on page 15, where plaintiff lists certain
19 personal jurisdiction recitals regarding the
20 nondiverse defendants, alleging that each of them
21 operates a medical practice in the city. There are
22 no allegations of wrongdoing with respect to the
23 nondiverse defendants here. It just says that they
24 operate a medical practice.

25 And you know, just briefly, as a detour,

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1 plaintiff's counsel mentioned that Michael Gallegos
2 is actually a pharmacist instead of a doctor. It's
3 all very difficult to tell from this complaint
4 because here it suggests that he operates a medical
5 practice, which at least to my mind sounds something
6 different than a pharmacy.

7 The second time that the nondiverse
8 defendants are mentioned in this case is on page 80.
9 And over the course of I think nine paragraphs, each
10 of the seven nondiverse defendants is mentioned once.
11 And the allegations against them are essentially that
12 they negligently overprescribed dangerous opioid
13 controlled substances through their practices.

14 The third and final time that the
15 nondiverse defendants are mentioned in this claim, in
16 a complaint that is hundreds of pages long and
17 includes 453 paragraphs, the third and final place
18 where these nondiverse defendants are mentioned in
19 this complaint is paragraph 361, where it lists the
20 nondiverse defendants and then says that the
21 nondiverse defendants had, quote, "unique duties
22 under the law as licensed health care professionals
23 not to prescribe outside the usual course of practice
24 for other than a legitimate medical purpose." That
25 is all the complaint says about the nondiverse

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1 defendants. For the purposes of the Court's
2 jurisdictional analysis, those are the factual inputs
3 that you need to look at for the transaction or
4 occurrence test of Rule 20 and the factual
5 allegations or common legal questions prong of Rule
6 20. It's also relevant to the Rule 1921 tributary of
7 the jurisdictional analysis that's relevant to the
8 first argument Endo made in its notice of removal.

9 But what you won't see in this complaint,
10 Your Honor, is any allegation that a nondiverse
11 defendant, for example, relied on a misrepresentation
12 made by a pharmaceutical manufacturer in prescribing
13 an opioid product. You will see no allegation that
14 one of the nondiverse defendants prescribed an opioid
15 product that was brought into New Mexico using a
16 distribution channel controlled by one of the
17 distributor defendants. And you will not find any
18 allegation in the complaint that one of these
19 nondiverse defendants prescribed an opioid product in
20 a prescription filled by a retail pharmacy named in
21 this complaint.

22 So with that in mind, Your Honor, let's
23 talk about the jurisdictional issues. And as I
24 mentioned, when Endo removed this case, we actually
25 provided three distinct grounds for federal

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1 jurisdiction. The removal was predicated on
2 diversity, but we argue that the nondiverse
3 defendants could be dropped or severed using one of
4 three doctrines. Two of the doctrines flow from Rule
5 21. The third is the Procedural Misjoinder Doctrine.

6 With respect to the Rule 1921 tributary,
7 the issue there is whether or not the nondiverse
8 defendants are necessary or dispensable parties to
9 the action. And if they are not, pursuant to
10 well-settled law, this Court has the ability, the
11 discretion to sever them for the purpose of
12 perfecting diversity jurisdiction.

13 The Rule 20 and 21 tributary and the
14 Procedural Misjoinder Doctrine, they vary from
15 district to district. In this district, Your Honor,
16 Flores-Duenas and Ullman has effectively collapsed
17 the two doctrines into a single doctrine, because
18 Your Honor has concluded that the egregiousness
19 overlay that usually sits on top of the Rule 20
20 analysis for procedural misjoinder is unnecessary.
21 So as a matter of housekeeping, despite the fact that
22 those arguments are made differently in the notice of
23 removal, I'm going to address them collectively in
24 this case.

25 So Your Honor, I'm going to start with the

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1 Rule 19 analysis. So pursuant to well-settled
2 precedence of the United States Supreme Court and the
3 Tenth Circuit, district courts have the authority to
4 sever unnecessary and dispensable parties for the
5 express purpose of preserving diversity jurisdiction.
6 It is true, as plaintiff's counsel said, that
7 Newman-Green is a case that didn't involve a remand.
8 In Newman-Green, the Supreme Court, as plaintiff's
9 counsel explained, was wrestling with the issue of
10 whether or not an appellate court could use Rule 21
11 to sever a party for the purpose of perfecting
12 diversity jurisdiction. The Supreme Court in a 7-2
13 opinion concluded that appellate courts had the same
14 discretion that had long been recognized in district
15 courts to use Rule 21 to sever those parties.

16 Interestingly, in the dissent to
17 Newman-Green, Justice Kennedy raised the very concern
18 that plaintiff's counsel raised here. He said,
19 "Look, I disagree with what the Supreme Court has
20 said with respect to this issue, but they've also
21 included this affirmation of a district court's
22 ability to use Rule 21 to sever unnecessary
23 dispensable parties for the purpose of perfecting
24 diversity jurisdiction."

25 And that gives me a lot of pause. What you

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1 don't see in the majority is any effort in light of
2 that dissent to suggest that's not precisely what
3 they meant district courts were invested with
4 authority to do. So district courts from around the
5 country have looked to the Newman-Green line of
6 precedent and also guidance from the respective
7 circuits that essentially say the exact same thing
8 that Newman-Green says. And they have on several
9 occasions across the country used Rule 19 to sever
10 nondiverse defendants who are dispensable and
11 unnecessary for the purpose of perfecting diversity
12 jurisdiction.

13 THE COURT: That seems like a very
14 unprincipled doctrine. It just seems like it just
15 gives -- you may have the authority, but I don't know
16 what guidance you would have to say. You'd just say,
17 "Well, I agree with the defendants; this case ought
18 to be in federal court, so I'm going to chop off the
19 nondiverse parties."

20 MR. PUIG: So Your Honor, it's very
21 similar --

22 THE COURT: That seems very unprincipled to
23 me.

24 MR. PUIG: It's very similar to procedural
25 misjoinder in that it is a doctrine that has been

1 created by judges that is traceable to federal
2 jurisdictional statute and Rules of Civil Procedure.
3 And ultimately and most importantly, Rule 21's
4 command that a district court may sever defendants --
5 or drop defendants, rather -- I know Your Honor is
6 keyed in to the difference between the word "sever"
7 and "drop" in Rule 21 -- on any terms that are just.
8 That's where it comes from. And the fact of the
9 matter is that district courts around the country
10 have applied the doctrine in exactly the way that
11 I've described to sever nondiverse defendants for the
12 purpose --

13 THE COURT: I don't understand what guides
14 them. I don't think you can articulate a principled
15 rule that allows a district judge to do that. I
16 mean, I think you want a brushback pitch to the
17 plaintiffs' bar that they can't join everybody in the
18 world. But in the end, it seems to me that it's very
19 difficult to come up with a principled rule to say,
20 "Well, okay, we're just going to drop these people so
21 that it remains in federal court." That's where the
22 corporation wants to be.

23 MR. PUIG: Well, it's not that simple, Your
24 Honor.

25 THE COURT: It's not that simple?

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1 MR. PUIG: The district court had to
2 conclude that the parties are unnecessary and
3 dispensable.

4 THE COURT: Well, okay. Tell me that.

5 MR. PUIG: How does that happen?

6 THE COURT: Yeah. You tell me how these
7 people are unnecessary to an abatement, because
8 they're saying they're going to have to bring two
9 suits if you sever them out.

10 MR. PUIG: The test that the district
11 courts have developed --

12 THE COURT: You just don't like these
13 people in there.

14 MR. PUIG: No, Your Honor, the test that
15 the district courts have developed is whether
16 resolving the claims against the nondiverse
17 defendants would necessarily resolve the claims
18 against the diverse defendants. And if the answer to
19 that question is no, then they are not necessary and
20 dispensable parties and are subject to severance
21 under Rule 19. That is precisely what the district
22 court in the Northern District of Ohio did in Joseph
23 v. Baxter. It's precisely what the district courts
24 around the country have done in other cases, as we
25 cite in our papers, including Sullivan v. Calvert

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1 from Maryland, Cook v. Bates from the Eastern
2 District of Virginia, and others.

3 And courts have recognized that this
4 authority should be used sparingly, but have also
5 identified cases in which it is particularly
6 appropriate to use. And one of those cases is when
7 there is an MDL involved, because an application of
8 the Severance Doctrine will help further the
9 objective of the MDL, which is the uniform treatment
10 of legal issues and judicial efficiency and economy.

11 Sullivan makes this point clearly.
12 Severance is "particularly appropriate because it
13 would allow for the transfer of plaintiff's claims
14 against the diverse defendants to the multidistrict
15 litigation." So courts have fashioned what I think
16 is a principled rule for the application of this
17 doctrine and recognized that it shouldn't be applied
18 in every situation, but that there are situations in
19 which it is especially appropriate for the doctrine
20 to be applied.

21 So plaintiffs respond to this argument
22 mostly by articulating arguments to counteract the
23 Rule 20 tributary of the Rule 21 Severance Doctrine.
24 They say things like, "Well, this arises out of the
25 same transaction or series of transactions." I

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1 disagree with that for reasons I can talk about, but
2 that's not the relevant inquiry. As I mentioned, the
3 relevant inquiry is whether the nondiverse parties
4 are unnecessary and dispensable.

5 And they also lean in heavily on the
6 prejudice argument. And first of all, the prejudice
7 argument depends on an assumption that you're
8 wrongfully in federal court, which obviously, that's
9 a premise that I don't adopt. I think that this case
10 belongs in federal court because the Court should use
11 Rule 19 and Rule 20 to sever the defendants.

12 But several courts around the country have
13 looked at the exact same arguments that plaintiff are
14 making in this case, specifically delays in the MDL
15 proceedings and also the empty-chair argument, and
16 have flatly rejected them.

17 Also, Your Honor, I would note that whether
18 or not the nondiverse defendants are in this case,
19 there is a high degree of likelihood that defendants
20 are going to argue about the respective culpability
21 of other classes of defendants. And so I just don't
22 particularly find the empty-chair argument persuasive
23 in this case, and neither have other courts who have
24 repeatedly rejected that argument in considering
25 these questions.

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1 So I'm going to transition to discussing
2 Rule 20, Your Honor, unless you have any other
3 questions.

4 THE COURT: No. Go ahead.

5 MR. PUIG: So separate and apart from
6 severance under Rule 19, as this Court has
7 recognized, Rule 21 and Rule 20 allow a district
8 court to sever misjoined parties under Rule 20. And
9 I'm not going to spend a lot of -- despite the fact
10 that plaintiffs spend probably 60 to 70 percent of
11 their papers telling this Court, which is a court
12 that has already adopted the Procedural Misjoinder
13 Doctrine, why the doctrine is essentially kooky and
14 should be rejected, I am not going to spend time,
15 unless Your Honor wants me to, discussing why this
16 doctrine is viable, because Your Honor has covered
17 that doctrine at length in Flores-Duenas, in addition
18 to Ullman. I am going to talk about the application
19 of the doctrine to the facts.

20 THE COURT: Let me ask this on their
21 criticisms of the doctrine. They certainly have
22 found cases that criticized it. I guess my thoughts
23 were that they involved a large number of district
24 judges from the Ninth Circuit. Has any of the
25 academic literature been more kind to the doctrine,

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1 or other district courts outside of the Fifth that
2 have been kinder to the doctrine than the cases that
3 they cite?

4 MR. PUIG: So I'd say that the academic
5 literature is about in the state that it was when
6 Your Honor wrote Flores-Duenas a few years ago; that
7 is to say, divided. There are obviously courts
8 across the country, as Your Honor recognized in
9 deciding Flores-Duenas that have rejected the
10 doctrine, and there are those that have adopted it.

11 I will say that Your Honor would not be the
12 first district court in the Tenth Circuit to not only
13 find that the doctrine is viable, but also to apply
14 it. A district court in the Western District of
15 Oklahoma both acknowledged that the doctrine is
16 viable and decided to apply it in a case a few years
17 ago. That case is Bunnell v. Oklahoma MH Properties,
18 Westlaw 2012 12863916. The division in the doctrine
19 is one of the reasons why I think it is so important
20 that the Court defer ruling on this remand motion,
21 which I'm going to return to when I have an
22 opportunity to argue the motion to stay. I know Your
23 Honor wanted me to focus on the jurisdictional issues
24 first.

25 But Your Honor has recognized that the

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1 doctrine is viable. Your Honor has considered two
2 cases, and on both cases decided that the facts did
3 not warrant severance or dropping the defendants
4 pursuant to the doctrine.

5 Let's look at Flores-Duenas. That case
6 involved a car accident. And there was a lawyer who
7 didn't do his job and did not bring a lawsuit against
8 the insurance company of an underinsured motorist in
9 time. So the plaintiff sued both her lawyer and the
10 insurance company, and on the basis that the
11 transaction or occurrence that united these claims
12 and allegations under Rule 20 was the car accident;
13 right? And Your Honor concluded that that made good
14 sense.

15 There are a lot of car accident cases in
16 the procedural misjoinder arena, so I'm going to use
17 a car accident example that I think will illustrate
18 precisely what is going on with respect to this case.
19 Plaintiffs want to take the transactional relatedness
20 requirement of Rule 20 and distort it until it has
21 virtually no meaning. And they do that by asserting
22 that the transactional relatedness requirement is
23 satisfied because all of the claims have something to
24 do with opioid-related harm. And what they do is:
25 They recast a test that requires you to identify a

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1 transaction or occurrence and say, "As long as this
2 has to do with opioid harm, these claims are properly
3 joined."

4 So using a car accident analogy, imagine
5 that somebody had the misfortune of being in three
6 car accidents in a month, and each car accident was
7 caused by another irresponsible driver who was
8 insured by its own insurance company. And then
9 imagine the person who had the misfortune of being in
10 those three accidents or being affected by those
11 three drivers bringing lawsuits against all three
12 drivers and all three insurance companies, and then
13 when asked, "Wait a minute, what is the transaction
14 or occurrence that unites these cases such that Rule
15 20's requirement is satisfied?" and responding by
16 saying, "Well, all of these cases have something to
17 do with me being hurt in a car accident."

18 That is precisely what is going on in this
19 case. Plaintiffs have said that the transactional
20 relatedness requirement of Rule 20 is satisfied
21 because every single allegation against these various
22 groups of defendants has something to do with
23 opioid-related harm. And if you take what they're
24 saying to its logical conclusion, that means that
25 they could name, for the purpose of defeating

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1 diversity jurisdiction, someone who was standing on a
2 street corner selling illicit fentanyl in an action
3 against manufacturers of prescription opioid
4 medications. They would be able to name somebody who
5 was driving a vehicle overdosed on opioid medications
6 and caused an accident because that person had some
7 role in causing opioid-related harm to the county --
8 or to the City of Albuquerque.

9 Your Honor, I submit to you that that
10 construction of Rule 20's transactional relatedness
11 test takes the test to a level of absurdity that
12 renders it completely meaningless. And courts around
13 the country, in considering this very issue, have
14 warned that, quote, "Courts must avoid viewing the
15 transaction or occurrence standard as too high a
16 level of generality lest claims be capriciously
17 joined in one lawsuit even though the only thing they
18 have in common is a solitary fact or set of facts
19 that are not tied together." That's reFX Audio
20 Software, which is cited in our papers.

21 THE COURT: What Court is that?

22 MR. PUIG: That's the Northern District of
23 Illinois, Your Honor. Other courts that have reached
24 similar conclusions for substantially the same
25 reasons. For example, the District of D.C.

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1 concluded, "It is immaterial that the claims are
2 linked in some sense as plaintiff claims. If the
3 manufacturer had never manufactured the device, the
4 health care provider could never have implanted it.
5 However, the applicable test for joinder requires
6 more." That's In Re: Stryker, Your Honor, from the
7 District of Minnesota, 2013 Westlaw 6511855.

8 And Your Honor, you know, these cases are
9 legion out there recognizing that the transactional
10 test under Rule 20, while permissive, is not
11 unlimited, and it must not be unlimited; otherwise,
12 it would be meaningless.

13 So to join defendants together in an action
14 and say, "Well, instead of identifying a transaction
15 here, I'm going to just say all of these defendants
16 were engaged in causing opioid harm and that's
17 enough," makes a mockery of the requirements of Rule
18 20.

19 The second thing that Rule 20 requires is
20 that there be an overlap in the facts or legal
21 issues; right? And here we reviewed the facts in
22 this case with respect to what is alleged as to the
23 nondiverse defendants. By plaintiff's own admission,
24 the nondiverse defendants had unique duties as
25 medical providers. And though there is some overlap

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1 in the claims, specifically the public nuisance
2 claims, the negligence claims, the gross negligence
3 and punitive damages claims, and the unjust
4 enrichment counts, courts have repeatedly found in
5 the context of procedural misjoinder that just
6 because you have an overlap in claims doesn't mean
7 that you satisfied the requirements under Rule 20.
8 That is because just because a defendant is named in
9 the same claim as another defendant and that claim
10 shares elements, it doesn't mean that the facts or
11 legal duties that are going to be applied to those
12 claims are the same or that there is any overlap.

13 Your Honor, I would like to return to the
14 arguments related to the motion to stay, unless Your
15 Honor has any questions regarding Rule 20.

16 THE COURT: Oh, go ahead. Why don't you go
17 on to the stay.

18 MR. PUIG: So Your Honor, as I mentioned
19 when I got up here, your intuition is exactly right.
20 I think that the best course of action here is to
21 either stay the case -- and although you framed it as
22 doing nothing, I would refer it or instead of staying
23 the case, deferring ruling on the motion to remand.
24 And there were four reasons that I was getting
25 through for that.

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1 The first one is that doing so is going to
2 promote consistency with respect to how this Court --
3 and by "this Court" I mean judges in this district
4 and also Your Honor -- has handled materially
5 identical opioid cases removed to this district. So
6 plaintiff's counsel noted that last -- well, in 2017,
7 2018, three cases were removed to federal district
8 court in New Mexico that are substantially identical.
9 They're cases in which the plaintiffs name
10 manufacturers, distributors, and pharmacies. And
11 then they tacked on nondiverse defendants who were
12 doctors accused of overprescribing opioids.

13 Endo removed the cases to this Court not on
14 a similar jurisdictional theory but on an identical
15 jurisdictional theory. Your Honor, in City of Mora,
16 which was drawn to Your Honor after its removal,
17 allowed the case to transfer to the MDL without
18 resolving a remand motion.

19 Now, plaintiff's counsel got up here and
20 said, "Well, maybe there was a bankruptcy issue and
21 maybe that's why the Court didn't act on the remand
22 issue."

23 Well, Your Honor, actually, I have a
24 special relationship to the Mora County case. I
25 started working at Arnold & Porter in October of

1 2017, and the Mora County case was the first case
2 that I was assigned in connection with this opioid
3 litigation. And I prepared the papers and I prepared
4 the response to the motion to remand. And I remember
5 exactly the jurisdictional issues that were raised in
6 that case, and they had nothing to do with a
7 bankruptcy stay. I think the bankruptcy issue was
8 manifested after we filed our papers, if I'm
9 remembering correctly, and it had to do with one of
10 the nondiverse defendants who was a doctor who I
11 believe may have been incarcerated.

12 But the bottom line is that your Court
13 allowed that case to transfer to the opioid MDL and
14 to promote consistency with the treatment of these
15 issues in this district, the Court should again do
16 that in this case.

17 And the Court's approach to the County of
18 Mora case brings me to my second reason. It's
19 consistent with a widely accepted practice and widely
20 applied practice in district courts around the
21 country, including the District of New Mexico, to
22 stay or otherwise defer a decision on a remand in
23 cases that are bound for MDL litigation. Of the more
24 than 2,000 cases that have been consolidated for
25 coordinated proceedings before Judge Polster, over

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1 200 of them were removed not using a similar but an
2 identical jurisdictional argument to the one Endo
3 used in this case. In each of those cases, by
4 definition, district courts either deferred ruling on
5 pending remand motions or entered a stay order. In
6 fact, dozens of these substantially similar opioid
7 cases removed on identical grounds started life in
8 the Tenth Circuit.

9 I worked, in particular, in Oklahoma on
10 dozens of these cases. More than 30, actually close
11 to 40 cases brought by cities and counties in
12 Oklahoma, again naming manufacturers, distributors,
13 and pharmacies, and then tacking on nondiverse
14 doctors accused of overprescribing opioid medications
15 were removed to federal courts in Oklahoma by Endo.
16 Several district courts in the Northern District and
17 Eastern District of Oklahoma entered stay orders.
18 The remaining cases deferred ruling on remand
19 motions. Every single case in Oklahoma that's been
20 removed to Oklahoma federal court using identical
21 jurisdictional arguments has transferred to the MDL.
22 In fact, if this Court grants the motion to remand in
23 this case, it will be the only district court in the
24 Tenth Circuit to order remand on a case removed using
25 the jurisdictional theory that Endo raised in this

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1 case.

2 THE COURT: What do you do with Judge
3 Herrera's opinion in the Balderas case?

4 MR. PUIG: I'm glad you asked, Your Honor.
5 Number one and most importantly, that case was
6 removed on federal question jurisdiction, not
7 diversity jurisdiction. So to the extent that the
8 Court evaluated the merits of the jurisdictional
9 issues and thought them lacking, it has no bearing on
10 the jurisdictional issues in this case.

11 Second, Your Honor -- and I'm going to talk
12 a little bit about the way that this general rule has
13 been applied in the District of New Mexico, but if
14 you read Judge Herrera's order in that case, it is
15 completely silent with respect to the stay analysis.
16 So she does the jurisdictional analysis on the motion
17 to remand, finds that there is no jurisdiction, finds
18 that there is no federal question jurisdiction, and
19 then remands the case, and in one sentence says, "And
20 I'm also denying the stay motion because it is moot."
21 There is no substantive discussion of the stay motion
22 whatsoever.

23 So district courts in New Mexico, judges in
24 New Mexico, have repeatedly recognized the general
25 rule that I'm talking about. We cite a couple of

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1 them in our papers. One that we do cite is New
2 Mexico State Investment Council v. Alexander, which
3 is a 2004 decision from Judge Vazquez, where Judge
4 Vazquez applies the general rules, grants a motion to
5 stay, and the case later transfers to MDL.

6 Another case that's helpful for Your Honor
7 to look at is a case called Torrez v. Johnson &
8 Johnson. It's a Gonzales decision from 2014, 2014
9 Westlaw 6910478. That case is particularly helpful
10 because it also collects several cases from judges in
11 the District of New Mexico doing precisely the same
12 thing.

13 In Alexander, the Court also recognized
14 that a stay or a deferral of the decision to remand
15 is particularly appropriate in cases where, quote,
16 "the jurisdictional issues raised in plaintiff's
17 motion to remand are both difficult and similar or
18 identical to those in other cases that have been or
19 will be transferred to the MDL."

20 So let's take each of those one at a time.
21 On the similarity issue there can be no dispute, Your
22 Honor. There are hundreds of cases before Judge
23 Polster that are raising identical jurisdictional
24 questions, and more are being transferred every day.
25 When plaintiff's counsel said that they are winning

1 the trend, I just winced, Your Honor, because the
2 fact of the matter is that dozens of these cases are
3 being transferred every other month. On the
4 conditional transfer order that the JPML is hearing
5 at the end of this month, on January 31, there are, I
6 believe, an additional 18 of these cases raising this
7 identical jurisdictional issue that are going to be
8 transferred at the end of January. So this idea that
9 there is this great awakening in the district courts
10 and that the tide is turning with respect to this
11 issue is simply false.

12 THE COURT: Well, what do you make of these
13 judges, some of whom I think very highly of, that are
14 granting these remand motions?

15 MR. PUIG: I'm glad that you asked, Your
16 Honor. So in response to the motion to stay, Your
17 Honor probably recalls seeing on pages 2 to 4 a
18 bulleted list of 21 cases where a district court
19 denied a stay motion and then ordered remand. I'm
20 sad to report, Your Honor, that I read all of them.
21 And the majority of those cases were removed on
22 aggressive federal question or CAFA arguments. In
23 fact, only four of the cases that are cited in that
24 list of 21 were removed on the jurisdictional basis
25 at issue in this case, which is the severance of

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1 nondiverse tertiary defendants using Federal Rule of
2 Civil Procedure 21 and the Doctrine of Fraudulent
3 Misjoinder.

4 For example, all of the Texas cases, though
5 they were removed on the basis of diversity
6 jurisdiction and severance, they were removed by the
7 distributors, and the distributors argued that the
8 manufacturers were dispensable parties subject to
9 severance. So I'm not surprised that those arguments
10 didn't prevail.

11 But the fact of the matter is that when you
12 actually look, when you appropriately frame the
13 jurisdictional question, and then look at the cases
14 that --

15 THE COURT: Would you say the same about
16 Judge Barbara Lynn in the Northern District of Texas
17 involving, I think, the County of Dallas?

18 MR. PUIG: Your Honor, the County of Dallas
19 case is one of those cases where the distributor is
20 removed, arguing that the manufacturers should be
21 severed, which, again, I think is a different and a
22 difficult argument to make.

23 THE COURT: Did the motion to remand in
24 County of Mora just not get set for a hearing before
25 the case got transferred to the MDL?

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1 MR. PUIG: It was set for a hearing, Your
2 Honor, and then, before the hearing could occur, I
3 want to say three days before the hearing could
4 occur --

5 THE COURT: It got transferred?

6 MR. PUIG: -- it got transferred. Exactly.
7 And I think it is important that Your Honor treats
8 these cases similarly. And the fact of the matter
9 is: Whether Your Honor or anyone intended it, there
10 are cases before Judge Polster removed from New
11 Mexico by cities and counties that are materially
12 identical and removed on similar jurisdictional
13 issues.

14 And the animating principles of MDL
15 litigation in the first instance, which are the
16 uniform treatment of legal issues and the promotion
17 of judicial efficiency and economy, are clearly best
18 served if Your Honor does what he said he was
19 inclined to do when he took the bench, which is to
20 defer a ruling on this motion to remand.

21 Your Honor, I just want to say a couple
22 more points, a few more points, and I appreciate you
23 for giving me an opportunity to argue at length on
24 these issues.

25 As I mentioned, the District of New Mexico,

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1 judges in the District of New Mexico, have not only
2 acknowledged but routinely applied the general rule
3 that a district court should defer ruling on a remand
4 motion in a case bound for the MDL to allow the JPML
5 to issue a final decision on transfer. Those cases
6 include some of the ones that I've cited. Alexander.
7 Judge Vazquez commented, quote, "Deference to the MDL
8 Court for resolution of a motion to remand provides
9 the opportunity for the uniformity, consistency, and
10 predictability in litigation that underlies the MDL
11 system."

12 Judge Armijo, in a case called New Mexico
13 v. Volkswagen Group of America, which is 2016 Westlaw
14 4072342, recognized, quote, "It would be a waste of
15 this Court's judicial resources to consider a motion
16 to remand on a case that ultimately may be
17 transferred to the MDL. The MDL judge will rule on
18 the motion to remand. There is no need to duplicate
19 work or risk inconsistent results."

20 I could keep going, but let me just
21 represent this to Your Honor: Last night I did
22 several searches trying to isolate every District of
23 New Mexico decision where a district court was
24 confronted with this question: Do I take up the
25 motion to remand or do I stay when there is an MDL

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1 proceeding?

2 I found about 15 of the cases, and with the
3 exception of one, every single judge who has
4 considered this question has granted a motion to stay
5 and deferred ruling on any remand motion in
6 litigations bound for an MDL. The one exception that
7 I could find was -- excuse me, Your Honor -- the one
8 exception I could find was a case decided by
9 Magistrate Judge Lynch. It's called Herbison v.
10 Chase USA, Westlaw 2009, 10708265. And after reading
11 it, I could understand why the court didn't apply the
12 general rule.

13 First of all, it was an extremely
14 aggressive CAFA removal. Second of all, and more
15 importantly, it turned out that there were no other
16 cases in that particular MDL that were removed using
17 that jurisdictional theory. So Magistrate Judge
18 Lynch, I think wisely, concluded that taking up the
19 stay issue was not important at that time.

20 THE COURT: Did you find a case that -- I
21 keep in the back of my mind that I had a case in
22 which there was the specter of an MDL. It wasn't yet
23 out there, but everybody was saying it's coming, it's
24 coming, but I didn't have conditional transfer
25 orders, I didn't have anything more than people just

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1 saying it's going to happen. Did you find when I had
2 a remand issue?

3 MR. PUIG: I didn't, Your Honor.

4 Before I sit down --

5 THE COURT: Why don't we do this: I need
6 to give Ms. Bean a break, and I'll let you figure out
7 what you want to say before you sit down. But let me
8 have a recess for about 15 minutes, let her rest, and
9 I'll come in and let you finish, and then we'll see
10 if any of the other defendants have anything they
11 want to say on it.

12 MR. PUIG: Of course, Your Honor.

13 THE COURT: All right. We'll be in recess
14 for about 15 minutes.

15 (The Court stood in recess.)

16 THE COURT: All right, Mr. Puig, if you
17 wish to continue your argument.

18 MR. PUIG: Yes, Your Honor, just a few more
19 minutes. Where I left off, I was discussing a number
20 of decisions from judges in the District of New
21 Mexico that have confronted this precise issue and
22 have applied this general rule concerning the
23 deferral of remand motions.

24 THE COURT: Are there a few district
25 judges, though, around the country -- looked to me

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1 like maybe a dozen, maybe a little more -- that are
2 doing what the City is wanting me to do?

3 MR. PUIG: Sure, Your Honor. Yes, Your
4 Honor. They're cited in their papers.

5 THE COURT: And you don't think Barbara
6 Lynn's opinion there is one of them?

7 MR. PUIG: No. Okay, well, I want to be
8 absolutely clear here, Your Honor. They cite a
9 number of cases in their papers. The vast majority
10 of those cases implicate cases that were removed on
11 entirely different jurisdictional grounds. And I
12 think that is a critically important distinction, so
13 I want to be careful about that.

14 Judge Lynn's opinion was a severance case,
15 but it was not a case removed on the theory that is
16 at issue in this case. It was a case removed on the
17 theory that manufacturers of opioid products were not
18 properly joined in an action with distributors of
19 opioid products. I think that is a very different
20 argument.

21 So are there decisions of district courts
22 addressing the exact jurisdictional argument at issue
23 in this case where courts have denied motions to stay
24 and remanded? Yes. Do they outnumber the hundreds
25 of cases that are already before Judge Polster where

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1 the district courts decided that the appropriate
2 course was to stay or defer? No, they don't, and not
3 by a long shot. It's not even close.

4 But in terms of the District of New Mexico
5 outside of the opioid context, again, out of 15 cases
6 that I was able to locate, only one district court
7 judge, a magistrate judge, decided that an MDL case
8 should not be stayed pending a remand motion and a
9 decision on transfer, and that was a case where the
10 jurisdictional issue raised was not common to the
11 jurisdictional issues that were already pending in
12 the MDL.

13 I've cited those cases into the record,
14 Your Honor. I've also cited several of them in our
15 papers. But in terms of the purpose for doing this,
16 the general rule is not just recognized by this Court
17 and other courts, the wisdom of the general rule.
18 It's recognized by the Manual for Complex Litigation,
19 which is prepared by the Federal Judicial Law Center,
20 which provides in relevant part, quote, "a stay
21 pending the panel's decision can increase efficiency
22 and consistency, particularly when the transfer court
23 believes the transfer order is likely."

24 And in the Tenth Circuit we've seen courts
25 applying, in the context of opioid cases, this

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1 general rule and staying cases removed on identical
2 grounds over objections concerning prejudice, over
3 objections concerning delayed adjudication of the
4 remand motion, over objections concerning appropriate
5 choice of forum from plaintiffs. Universally in the
6 Tenth Circuit, courts have stayed those cases or
7 deferred ruling on remand motions in cases that are
8 removed on identical grounds. I'll direct the
9 Court's attention to the Osage decision, where Chief
10 Judge Frizzell, in the Northern District of Oklahoma,
11 said, quote, "A stay will allow for centralized
12 consideration of the jurisdictional issues and
13 conservation of judicial resources. The Court finds
14 that under the circumstances, the gains in judicial
15 efficiency and consistency allowed by a stay outweigh
16 the potential prejudice to the plaintiffs resulting
17 from delay in adjudication of the motion to remand."

18 And then, you know, with regard to the
19 prejudice issue, Your Honor, the central prejudice
20 that Endo is presenting here that has been recognized
21 in opioid litigation, but also in those District of
22 New Mexico cases that I discussed, is a risk of
23 inconsistent treatment of similar jurisdictional
24 issues and an undermining of the essential purpose of
25 MDL proceedings in the first instance. This Court

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1 and others have uniformly recognized that that is a
2 serious hardship to defendants and it also undermines
3 the MDL system, and courts, including this Court.
4 And the decisions that I have been citing have
5 rejected precisely the arguments that plaintiffs are
6 making regarding a delay, regarding having to
7 litigate in a multidistrict litigation, and the other
8 prejudice issues that they bring up in this case.

9 Before I sit down, Your Honor, there are a
10 few points that I want to directly respond to that
11 plaintiffs made in their papers and also in argument.
12 The first is this notion that this Court somehow
13 lacks jurisdiction to even entertain the possibility
14 of a stay. And I may be getting myself into trouble,
15 because it seems like Your Honor shares that view.

16 THE COURT: I'm concerned.

17 MR. PUIG: I just want to say, Your Honor,
18 that pursuant to long-standing Supreme Court
19 precedent, quote, "the power to stay proceedings is
20 incidental to the power inherent in every Court to
21 control its dockets," and in these precise
22 situations, courts around the country obviously have
23 concluded that they have jurisdiction to enter stays
24 in opioid cases because they've done so in dozens of
25 cases in this district and in hundreds of cases

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1 around the country.

2 THE COURT: When do you think that the
3 transfer order is going to come out on this case?

4 MR. PUIG: March 26, Your Honor, at the
5 latest March 27.

6 But with respect to, like, that threshold
7 "Can I do it, do I even have the power to ascertain
8 or to order a stay?" the District of New Mexico has
9 spoken directly on this issue as well. In Torrez v.
10 Johnson, Judge Gonzales -- this is, again, 2014
11 Westlaw 6910478, said, quote, "This Court, as well as
12 other district courts, acknowledge that a district
13 court may in its discretion stay proceedings pending
14 an MDL transfer without first ruling on a pending
15 motion to remand."

16 Judge Armijo, in the Volkswagen case, 2016
17 Westlaw 4072342, "Granting a motion to stay is not
18 adjudicating the merits of a case, and precedent does
19 not require resolving jurisdictional matters before
20 deciding whether to grant a stay motion."

21 And in other district courts in the Tenth
22 Circuit, including my home state of Colorado, courts
23 have reached the same conclusion. This is Franklin
24 v. Merck, from Judge Wiley Daniel in the District of
25 Colorado, Westlaw 2007 188264, quote, "Although I

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1 could rule on plaintiff's motion to remand prior to
2 ruling on the motion to stay, I note that the vast
3 majority of courts to consider this issue in this
4 context have chosen to rule on the pending motion to
5 stay even when a motion to remand has also been filed
6 in the MDL litigation."

7 So I want to be clear. If Your Honor just
8 wants to defer ruling on the motion to remand, that
9 is substantially the relief that Endo has requested
10 in the motion to stay. I'm not insisting that you
11 write a stay order. But I do think that the Court
12 has the jurisdiction to do it, and I didn't want to
13 let that go unanswered.

14 The second thing that I want to address is
15 the thing that bothered me the most about both the
16 papers and the argument today. And it is this
17 extraordinarily misleading argument that surfaced in
18 both plaintiff's motion for expedited treatment and
19 in response to Endo's motion to stay. Plaintiff
20 points to a filing moratorium on certain pleadings in
21 this MDL. And they say that the filing moratorium
22 is, quote, "a de facto death knell for this
23 litigation," and they go on to say about Judge
24 Polster, quote, "Judge Polster will refuse to even
25 consider that he is without subject matter

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1 jurisdiction."

2 That is false, Your Honor, and it is
3 demonstrably false. First of all, with respect to
4 the moratorium, and at the risk of stating the
5 obvious here, Your Honor, the moratorium is on the
6 filing of new remand motions. And last I checked,
7 there is a pending remand motion in this case which
8 will be transferred to the MDL when the JPML issues
9 its transfer decision, if it is allowed to do so.

10 Second of all, related to the moratorium,
11 as Your Honor, I'm sure, well appreciates,
12 moratoriums on filings in MDL litigation are routine
13 and they don't reflect some kind of hostility of the
14 MDL judge with respect to deciding those issues. For
15 example, just because the moratorium would -- you
16 know, just because an MDL judge enters a moratorium
17 on motions to dismiss certainly doesn't mean that the
18 judge is going to never decide motions to dismiss.
19 It means when you're managing 2,000-plus cases, you
20 can't have the parties, plaintiffs and defendants
21 included, filing whatever they want whenever they
22 want and drowning the court in a deluge of paper.

23 So that brings me to the last point that I
24 want to make on this issue, which is actually the
25 part that troubles me about the characterization.

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1 The idea that -- I wrote it down -- quote, "the
2 federal court won't rule on the motion to remand in
3 this case" is not only false and misleading, it is
4 diametrically opposed to what Judge Polster has said
5 on the record multiple times. Judge Polster has
6 repeatedly expressed that the parties establish a
7 framework, with the Court's guidance, at an
8 appropriate time for the resolution of pending remand
9 motions. And he has said that he wants to resolve
10 the remand issues collectively so as to ensure that
11 legal issues are resolved consistently, which, again,
12 is the purpose of MDL litigation in the first
13 instance.

14 The last point I want to make, Your Honor,
15 is this notion that --

16 THE COURT: Has he granted some remand
17 motions?

18 MR. PUIG: Yes.

19 THE COURT: There have been a few? And can
20 you tell me what the character of those were?

21 MR. PUIG: Sure. He's both denied and
22 ordered remands, so he's done both things. He's
23 taken up remand issues.

24 THE COURT: Is that about three motions
25 that he's done?

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1 MR. PUIG: No, Your Honor, it's more than
2 that. There were a couple in the Tenth Circuit from
3 Oklahoma that had to do with a very interesting,
4 actually, jurisdictional argument that would be
5 applicable in tribal cases based on federal officer
6 jurisdiction. So Judge Polster, I think about a year
7 and a half ago, took those up, I think -- and this is
8 important -- I think out of recognition that there
9 weren't going to be a bunch of those cases in the
10 MDL. So he said, "You know what? I'm going to
11 decide these now."

12 And I think if you contrast that, one of
13 the explanations for why Judge Polster has not moved
14 on the diversity-based severance removals like this
15 case is because -- I'm shocked, but three years later
16 there are still cases that are being filed and
17 removed to federal court, you know, virtually every
18 week, that are being removed on this basis. So I
19 think Judge Polster just doesn't think that now is
20 the appropriate time, because there are still more
21 cases coming in.

22 But beyond the federal officer removal
23 grounds, two weeks ago Judge Polster ordered remand
24 in two Missouri cases brought by Missouri counties
25 that were removed to federal court on the basis of

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1 federal question jurisdiction that had some unique
2 issues. So this idea that he's just sitting there --

3 THE COURT: What were the circumstances of
4 those cases? What caused him to send those back to
5 state court?

6 MR. PUIG: The state court actually reached
7 out to the MDL in that case and said, We have these
8 other cases that are pending."

9 THE COURT: "We don't have enough work? We
10 want some other cases"?

11 MR. PUIG: I was shocked. I was shocked.
12 But the state court actually reached out and said,
13 "We'd really love it if you address these two remand
14 motions, because we think these cases belong in a
15 coordinated proceeding down with us."

16 And Judge Polster said, "Sure, I'll take a
17 look," and he sent it back. Again, federal question
18 removal is not related to the jurisdictional issue
19 here, but I just find it disappointing that the
20 plaintiff is characterizing Judge Polster as someone
21 who is sitting in a tower with disdain for the
22 jurisdictional issues, refusing to think about them
23 or to consider them, and that if Your Honor allows
24 the case to transfer to the MDL by deferring a
25 decision on remand, that somehow you are condemning

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1 them to an eternity without any sort of resolution of
2 this issue.

3 The last thing that I will say, Your Honor,
4 before I sit down is: Plaintiffs have come up here
5 and said, "We can't point to any single orders of
6 district courts that have accepted our jurisdictional
7 arguments." That's not true, and we cite cases in
8 our briefs.

9 But you know, just to give you an example,
10 the only case -- there is one case in the Tenth
11 Circuit that was removed on the jurisdictional basis
12 here, where a Court provided any commentary
13 whatsoever on the jurisdictional issues at issue in
14 this case. That was a decision from the Eastern
15 District of Oklahoma by Judge Lungstrum. That case
16 was removed on the same basis here because it named
17 nondiverse doctors accused of overprescribing
18 opioids.

19 Judge Lungstrum issued an order staying the
20 case. And in his order staying the case, he said
21 some things about the jurisdictional basis that was
22 asserted by Endo. He said, and I quote, "At first
23 blush, jurisdiction does not appear to be lacking in
24 this case and therefore, the Court is not moved by a
25 likelihood that plaintiff's stay in federal court

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1 will be unfairly extended. Indeed, the existence of
2 these difficult questions of jurisdiction weigh in
3 favor of their resolution by one court making similar
4 rulings in hundreds of cases, in keeping with the
5 purpose of the MDL framework."

6 And Judge Lungstrom went on to say, quote,
7 "Severance would present an attractive option for the
8 Court because it would allow the claims against the
9 other defendants to be included in the MDL." That's
10 the only district court decision in the Tenth Circuit
11 that passes any commentary whatsoever on the
12 jurisdictional issues in this case. There are
13 district court decisions from West Virginia that have
14 expressly adopted the argument for jurisdiction that
15 we're making here today for the express purpose of
16 perfecting diversity jurisdiction by severing
17 nondiverse doctors.

18 And Your Honor, I would submit to you that
19 the reason why there aren't a barrel full of orders
20 accepting our jurisdictional premise is because the
21 first argument that we make in response to every
22 motion to remand is that the district court should
23 defer consideration and allow Judge Polster to take
24 up similar issues alongside similar cases. So it's
25 not particularly a surprise when district courts take

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1 that invitation, even if they think that the
2 jurisdictional issue is meritorious, and allow the
3 cases to transfer to the MDL.

4 Thank you so much, Your Honor.

5 THE COURT: Thank you, Mr. Puig.

6 Any of the other defendants want to say
7 anything? Let me ask the ones in the courtroom
8 first. Any of the individual defendants? You enjoy
9 being sued by the City of Albuquerque? Anybody want
10 to speak?

11 How about on the phone? Anybody want to
12 speak on the defendants' side on the phone?

13 All right. Ms. Saucer, if you wish to have
14 the last word on the motion to remand, if you want to
15 talk about the motions to stay.

16 MS. SAUCER: Yes, Your Honor. I'd like to
17 make six points, and I'll try to be quick. Number
18 one, in what opposing counsel said, in trying to
19 distinguish Barbara Lynn's opinion --

20 THE COURT: Whose opinion?

21 MS. SAUCER: Barbara Lynn, County of
22 Dallas. The arguments that opposing counsel made,
23 the admissions that opposing counsel made, have
24 destroyed a good number of the statements that he's
25 made to you today.

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1 Number two, I take great issue with these
2 computer searches, which are defective.

3 Number three, the County of Mora and the
4 issue of doing nothing is something.

5 Number four, what is applicable versus
6 inapplicable?

7 Number five, which is to talk about the
8 gross mischaracterization of our complaint here.

9 And finally, number six, those two Missouri
10 cases and what's going on in the MDL.

11 Number one, we all heard opposing counsel
12 just say that Judge Barbara Lynn's opinion in the
13 County of Dallas case was -- and I think I'm
14 quoting -- entirely different jurisdictional grounds.
15 Very different argument. And that allegedly was
16 because, well, there, the distributors were making
17 the argument, and the distributors were saying,
18 "Well, we're different than the manufacturers." And
19 that's entirely different from the argument here,
20 which is that the manufacturers and the distributors
21 together are different from the pharmacist, Michael
22 Gallegos, and the six prescribers. Completely
23 different.

24 If that's completely different, then their
25 200 cases are not 200 cases, because the origination

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1 of these types of motions was precisely the
2 distributor making that argument of the manufacturer.
3 And if opposing counsel is going to concede that that
4 is entirely different and it has nothing to do with
5 any of -- anything, then all the numbers they've
6 given you are flatly wrong. Because the numbers
7 they've given you are cases that were removed on
8 complete diversity. And the first wave of those were
9 the distributors making that argument about the
10 manufacturers. And if they're irrelevant, that
11 number isn't 200. It's a much, much smaller number.

12 Furthermore, all of their arguments about
13 efficiency and there's not going to be any prejudice
14 because it's so efficient to have Judge Polster
15 decide this. Really? Well, if they've just admitted
16 that it's entirely different, entirely different, if
17 the distributors are saying this about the
18 manufacturers, well, wait a minute. How is it
19 efficient for Judge Polster to look at the pleadings
20 of the seven people, because they would be entirely
21 different, too. So where is the efficiency served by
22 shipping this off to Judge Polster, if it's entirely
23 different, if it's the distributor saying this about
24 the manufacturers versus the manufacturers and the
25 distributors saying this about the pharmacists and

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1 the prescribers. He's destroyed his own argument.
2 And the attempt to distract the Court from the
3 excellent work by Judge Barbara Lynn -- we're very
4 proud of her in the Northern District of Texas. Love
5 her.

6 THE COURT: She's got a house in Santa Fe,
7 too, so she pays property taxes over here as well.

8 MS. SAUCER: Oh, Your Honor, I didn't know
9 that. Oh, okay.

10 THE COURT: Pretty nice house, too.

11 MS. SAUCER: She used to have a house in
12 White Rock Lake. I'm sorry. I digress. Late on a
13 Friday.

14 My second argument is the two computer
15 searches that we heard about. So the first computer
16 search was: I looked and I only found 15 cases where
17 anybody refused to let this just be shipped off to
18 the MDL, and that was Magistrate Judge Lynch, and
19 that was some crazy CAFA theory. Well, that's a very
20 curious thing. Then we heard this discussion of
21 Oklahoma, which, by the way, was a case on the stay.
22 It wasn't a case that said, "I deny the remand motion
23 because there is jurisdiction."

24 But anyway, back to these computer
25 searches. Well, I found it very alarming for

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1 opposing counsel to tell Your Honor that he did a
2 computer search and the only thing he came up with
3 was this case by Magistrate Judge Lynch, given that
4 the Court had just asked him, just asked him like
5 five minutes before, about the New Mexico ex rel
6 Attorney General Balderas versus Purdue Pharma
7 decided by Judge Judith C. Herrera and published in
8 F.Supp. 3d in the year 2018. How is it that opposing
9 counsel's diligent search, where he only found 15
10 cases, missed this one? I don't know. But we heard
11 opposing counsel say, "Well, ignore Judge Herrera,
12 because she didn't discuss it enough. She denied
13 stay. She didn't discuss it enough."

14 I would respectfully request, Your Honor,
15 and then go back to the questions that Your Honor
16 asked me earlier, to pages 1247 and 1248 of this
17 published decision by another member of this
18 honorable Court.

19 Now, she doesn't use the term in this
20 decision about -- doesn't say CTO, that the
21 conditional transfer order was granted. But reading
22 it, it's clear that it was. And I say that because
23 there is a discussion of it's going to be transferred
24 to the panel on June 12, or the briefing will be
25 finalized on June 12, 2018; and that the defendant

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1 argued that in two or three months, the JPML will
2 issue an order conditionally transferring this case,
3 et cetera, and therefore request a stay of all
4 proceedings. And so there is a discussion, and then
5 there is a quote from the brief, which she did
6 consider because she's quoting the briefing on the
7 State of New Mexico saying, "Don't bounce the case
8 between federal courts lacking subject matter
9 jurisdiction."

10 And so there was a date here as we have one
11 conceded here, the conceded day here is March 26.
12 Here there was a date listed of June 12, 2018.

13 And moreover, I would say that since this
14 decision was penned, the reasons compelling rejection
15 of this argument to just say it and let it be shipped
16 off are even more acute, Your Honor. They're even
17 more acute. Because what we know happened after this
18 decision was penned is that there are no rulings on
19 any of these issues. And we've just learned,
20 according to this admission by defense counsel, that
21 these issues are very different than the other
22 alleged 200 cases. This is completely different
23 because it's different types of defendants.

24 And so even if there is, according to
25 defense counsel, a ruling, it's going to be

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1 completely different because it won't be these exact
2 defendants we're talking about or this category
3 defendant versus the other category defendants,
4 because defense counsel admitted that they're very
5 different.

6 So going to my third argument, okay, on
7 this issue of -- well, I can just -- okay. On the
8 issue of doing nothing, just doing nothing is doing
9 nothing, and that's the best thing to do, because it
10 will -- it won't interfere. And doing nothing is
11 nothing.

12 Opposing counsel's arguments prove that
13 doing nothing is something because they're arguing
14 County of Mora to you. They are arguing that doing
15 nothing means something. They are arguing that doing
16 nothing proves that they're right. They just did it.
17 We just heard all this discussion of County of Mora.
18 County of Mora allegedly proves that they're right.
19 So doing nothing is doing something because doing
20 nothing is saying no to the City of Albuquerque.

21 I want to jump to my fifth argument, which
22 is to talk about the complaint. We cite in the
23 complaint at paragraph 232, that Albuquerque has been
24 designated a high-intensity drug trafficking area by
25 the Office of National Drug Control Policy, and that

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1 is because of the geography and the location. And I
2 take great umbrage with the completely inaccurate
3 statement by opposing counsel that allegedly our
4 complaint is a cut-and-paste from a federal case.
5 That's impossible and it's not true.

6 THE COURT: Do you have a state RICO claim
7 in yours?

8 MS. SAUCER: I think that we -- there is a
9 New Mexico RICO law that has to do with drug
10 trafficking that is I think in the state AG's case,
11 but it's not here. And I want to say that's -- is it
12 because of standing?

13 THE COURT: Well, the reason I ask is
14 because you do have RICO allegations in here, and I
15 thought that looked like --

16 MS. SAUCER: Oh, I'm sorry. I'm sorry.
17 You know what --

18 THE COURT: Paragraph 363.

19 MS. SAUCER: I'm sorry. I'm sorry. You
20 know, I'm sorry. You're absolute right. I blocked
21 it out because it was against the manufacturer
22 defendants only. I'm sorry. Yes. That's Count 2.
23 But it's not against the defendants that we're
24 talking about, so I just didn't remember that. I'm
25 sorry. I'm focused like a laser on these defendants,

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1 Your Honor. Yes, I'm sorry. They're here. But
2 that's the state -- that is all under the state law.
3 So that's one reason why it's not a cut-and-paste.

4 But that RICO, that is unusual to New
5 Mexico. I think this is the one where it's a narrow
6 state RICO statute. It's more narrow than the
7 federal one.

8 But what I was going to say about the
9 pleading, not just that section which I had
10 forgotten, I've been focusing on public nuisance,
11 negligence, gross negligence, unjust enrichment,
12 because those are the ones that are against all of
13 the defendants, including the ones we're fighting
14 about today.

15 But to talk about this issue of, did we cut
16 and paste from a federal complaint, in paragraph 149
17 starting on page 48, there are multiple, multiple
18 citations to New Mexico law, multiple citations to
19 16.19.8.23, to .48, to .13 in paragraph 149, 150,
20 151, 152, 153, 154, 155, 158. In every single one of
21 these paragraphs there are multiple citations to New
22 Mexico law, to the NMAC, and to the NMSA 1978. So
23 this idea that we cut and pasted this and it's just a
24 federal complaint is absolutely not true.

25 Also, continuing on, paragraph 171,

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1 paragraph 172. Again, multiple citations to New
2 Mexico law. Paragraph 285, paragraph 286, paragraph
3 287, paragraph 289. There we start -- not only are
4 we citing New Mexico law, and not only are we citing
5 the statutory law, not only are we citing all the
6 regulations, we are citing case law decided by the
7 State of New Mexico.

8 On the issue of what is applicable versus
9 inapplicable, I touched on that earlier. Here's the
10 thing. The Oklahoma case had to do with a stay.
11 This judge -- the search that opposing counsel
12 allegedly did missed the decision on the New Mexico
13 AG's case. Respectfully, it would be most
14 consistent, since we have a published decision in
15 which another judge of this honorable district court
16 did not stay the case and went to the merits of the
17 motion to remand for consistency within the District
18 of New Mexico, the thing to do for consistency and
19 respect for the other New Mexico judges would be to
20 follow that decision and rule on the remand notion.

21 And on this issue of -- I heard again
22 opposing counsel citing these cases that have nothing
23 to do with anything here. Joseph versus Baxter and
24 Cook versus Bates and Sullivan. All of those have to
25 to do with medical malpractice and doctors, the thing

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1 and the action in the same case. Completely
2 different.

3 The reFX Audio case. That had to do with
4 copyright infringement. I have a list, some of these
5 car crash cases. My favorite is the Wesley versus
6 Progressive case cited in footnote 7, page 12 of the
7 remand brief. It was a car crash and the local
8 Louisiana defendant, the local defendant that
9 defeated diversity, was the plaintiff's father;
10 right, for something that he did or failed to do
11 before the car crash. So that's what they're citing
12 here. They've searched the world over and they're
13 citing everything but cases by governmental entities
14 that are trying to abate the opioid epidemic. All of
15 those cases that have reached this issue other than
16 that West Virginia outlier, which was based on a West
17 Virginia statute, the ones that have looked at the
18 issue, they have all said, No, plaintiffs are not
19 required to have two different cases in two different
20 jurisdictions. It's the same damages. It's the same
21 abatement model. And this idea that, oh, well, we're
22 going to sue someone driving down the street high;
23 well, when I do sue someone driving down the street
24 high, then fine, I'll lose.

25 But that's not what we've done here. What

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1 the City of Albuquerque has done, in line with other
2 governmental entities around the country, are to sue
3 the known culpable parties. It is very important to
4 us that when the prescribers are blamed. And I've
5 been in these arguments on motions to dismiss, and
6 sure enough: We're not responsible, we just drive
7 the armored trucks. It's the prescriber. They wrote
8 the prescription. We can't do anything. Now, that's
9 not true, but nonetheless, we want the prescribers in
10 the case to say, "You lied to us," et cetera, et
11 cetera, so that these defendants can't blame an empty
12 chair with an entire category of defendants that's
13 not there to push back.

14 Finally, on this issue of what's going on
15 in the MDL. Okay, the two -- first, the idea that,
16 well, it doesn't matter that there is a moratorium on
17 remand motions because we already filed ours.

18 I've been doing this for a while and every
19 single time I've lost at this stage and gone to the
20 MDL, what we've done is file a renewed remand motion.
21 I mean, to my knowledge, Your Honor, there is no MDL
22 judge that's pulling every single docket to say, you
23 know, what was filed before you got here? Which is
24 the reason for that moratorium. So that, I
25 respectfully submit, is a distinction without a

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1 difference.

2 THE COURT: That strikes me as strange. I
3 mean, I'm not saying that's not what you're doing,
4 but you know, when I get cases on the MDL, I'm not
5 requiring -- I don't want everybody to refile. I
6 have enough paper. I don't want a refile. And when
7 I remand back to state court, simpler matter, you
8 know, I leave the motions pending. I don't go
9 through and clean them out and dismiss them or
10 anything like that. I leave them for the state
11 judge. That's the whole purpose of remanding the
12 case is not to act on the motions that are there. So
13 I don't know why you would need to refile them.

14 MS. SAUCER: Well, when I have, it's
15 because we're desperate to get the case back --

16 THE COURT: I mean, you've got a good
17 motion here. Why do you need to redo it?

18 MS. SAUCER: I mean, I did it in the
19 Fresenius case to get a hearing date. And then we
20 had a lot of issues there where the judge insisted on
21 different circuit laws. That judge said, "I don't
22 want your Fifth Circuit cites. I want your First
23 Circuit cites."

24 THE COURT: I understand that.

25 MS. SAUCER: But on this issue in Missouri,

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1 what happened, opposing counsel just admitted that
2 the state judge in that case asked the federal judge
3 to bring the case back. I don't know how that
4 happened, but we don't have any means of doing that.
5 I mean, this idea --

6 THE COURT: Well, that's pretty common in
7 these MDLs, is that you've got these things going on
8 in the state, and the state and the federal judges
9 are cooperating together. I think Judge Breyer did
10 it out with the Volkswagen cases out in California,
11 if I recall.

12 MS. SAUCER: But the idea that, well -- so
13 I didn't see what happened. I don't know what
14 happened in Missouri, but I think the judge is going
15 to write a letter saying, "I want the cases back."

16 THE COURT: Well, I bet they just pick up
17 the phone and say, "You know, it would really help us
18 if you'd do those two motions to remand so that we
19 could consolidate them with the cases we have." It
20 makes sense to me. I don't know if that's what
21 occurred.

22 MS. SAUCER: I would love that. But we
23 have absolutely no way, Your Honor, of making that
24 happen. We have no recourse to make it happen. And
25 to my knowledge, it hasn't happened in any other of

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1 these cases in New Mexico. Our only chance is you.

2 Otherwise --

3 THE COURT: Well, isn't the problem for
4 you -- unlike Missouri, we don't have a cluster of
5 these floating around in state court -- there is not
6 over in the Second Judicial District 20 of these
7 cases and they would like to have these cases with
8 them?

9 MS. SAUCER: Maybe -- Your Honor, I don't
10 know. Your Honor, I don't know what happened in
11 Missouri. I wish I did, so I could replicate it for
12 all my other clients. I mean, maybe that is why.
13 But the thing is, that's not going to happen for
14 Albuquerque. I mean, we need you. And Albuquerque
15 is very hard hit. We've cited in our complaint that
16 Albuquerque is particularly hard hit. And we need
17 the case to be in a court with subject matter
18 jurisdiction that will allow us to proceed with
19 discovery in the case in order to grapple with this
20 horrific, medically made medical catastrophe of
21 opioid overdose, addiction, and death.

22 Does the Court have any questions for me?

23 THE COURT: Can you remind me what you gave
24 me these for?

25 MS. SAUCER: Okay. Is that the City of

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1 Mora? It was because in 2017, the representation to
2 the Court was: Don't worry. This will just be
3 brief, brief, brief, brief. And we're sitting in
4 2020, and that's not brief.

5 THE COURT: All right. Anything else you
6 want to say on your motion to remand, your motion for
7 expedited decision on your motion to remand, or
8 anything in response to the motion to stay that's
9 been filed by the defendants?

10 MS. SAUCER: Unless the Court has
11 questions, I think I've talked long enough.

12 THE COURT: All right. Thank you,
13 Ms. Saucer.

14 MS. SAUCER: Thank you.

15 THE COURT: Let me let the defendants maybe
16 have the last word on the motion to stay. Then I
17 think that will probably bring us to a conclusion
18 here.

19 MR. PUIG: Sure. I just have a couple of
20 things to say.

21 First of all, with respect to Balderas,
22 when I was representing that I had done a search
23 about district courts in the District of New Mexico
24 who had considered these issues, I said who had
25 undertaken the analysis related to the general rule,

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1 right? And there is a body of case law from a case
2 from the Central District of California called
3 Rivers, and a case from the Eastern District of
4 Wisconsin called Meyers that set forth standards for
5 what a district court should consider when confronted
6 with a dueling remand motion and a motion to stay in
7 MDL litigation.

8 And the point that I had with respect to
9 Balderas was, if you read the order, there is no
10 framework. It's not like I'm setting out these
11 factors and I'm considering these issues, and having
12 considered them, I conclude X. The judge denies the
13 remand motion and then says at the end -- or excuse
14 me, grants the remand motion, and at the end says,
15 "The motion to stay is denied as moot."

16 So in terms of the New Mexico district
17 courts that have undertaken that analysis under the
18 general rule that's reflected in these various lines
19 of cases from district courts, I was only able to
20 find one. My searches did return Balderas. I didn't
21 include it in the list, number one, because I was
22 already aware of it; and number two, because it
23 didn't fit that rubric that I provided to the Court.
24 So I just wanted to make that clear.

25 Second of all, Balderas is a federal

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1 question removal. It has virtually no probative
2 value.

3 THE COURT: What is the federal claim in
4 that case?

5 MR. PUIG: So if I'm not mistaken, it is a
6 distributor removal theory that we see often. And
7 this idea is that -- so obviously, the plaintiffs who
8 don't want to get into federal court don't plead
9 violations of federal law; right? But they often
10 plead violation of state analogues to the Controlled
11 Substances Act. And the distributors around the
12 country have made these federal question arguments.
13 And by the way, when I have referred to, "It was a
14 federal question argument," throughout the day, I'm
15 basically talking about this argument. So the
16 distributors will argue that under a line of
17 authority called Gunn and Grable, that the state
18 court duties are actually derivative of federal CSA
19 duties and, therefore, raise a substantial federal
20 question such that the Court may exercise federal
21 jurisdiction.

22 That was the jurisdictional theory that was
23 at play in Balderas. It has virtually no probative
24 value at all with respect to this issue. And the
25 case that does have probative value in terms of

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1 consistency and treatment is County of Mora, in which
2 Your Honor either intentionally or unintentionally
3 followed the general rule by allowing the MDL --

4 THE COURT: I think we looked at it during
5 the break, and I had it a full month. And I think I
6 was trying to be a good judge. I set it for a
7 hearing, and then three days before --

8 MR. PUIG: It got scooped up. And I'm not
9 disputing that, Your Honor. I'm just saying that it
10 would be a shame if there is a case in the MDL that
11 is substantively identical in all material respects
12 because Your Honor's Court allowed it to travel,
13 along with two others, and then all of a sudden, now
14 Your Honor pulls back a case that would otherwise go
15 to the MDL and be resolved alongside of those similar
16 cases from New Mexico. That's the point that I'm
17 trying to make with respect to County of Mora, Your
18 Honor.

19 I also want to just talk about the
20 prejudice issues here, Your Honor. The plaintiffs
21 have spoken eloquently today about the crisis and the
22 emergency nature and the prejudice that would flow
23 from this case being transferred to the MDL. I would
24 point out an argument that we made in our reply brief
25 to the stay motion, which is that this case was

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1 pending for close to five months before they decided
2 to serve the defendants. So I am frankly skeptical
3 about the argument that emergency adjudication and
4 anything other than emergency adjudication of
5 everything in this case is going to result in
6 significant prejudice.

7 Finally, plaintiff's counsel got up and
8 made an argument that I somehow defeated my entire
9 argument with respect to the stay or jurisdiction
10 because I recognized, in a way that I hoped was
11 intellectually honest, that the application of the
12 Severance Doctrines depends on the facts of the cases
13 and the arrangement and the relationships between the
14 parties. So the Texas cases, which again were
15 removed on the basis of severance but relied on a
16 completely different factual argument related to the
17 doctrine that I'm sure Your Honor would have rejected
18 if we had presented it here -- there was no need
19 to -- but that relied on an argument that
20 manufacturers and distributors could be severed
21 because there was no factual nexus under Rule 20 and
22 because they were unnecessary parties.

23 I don't think I am making any great
24 concession to argue that the factual circumstances
25 where the nondiverse spoiler defendant is a doctor

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1 who has been accused of overprescribing opioid
2 medications without medical need and having unique
3 duties that are unique to medical providers is an
4 entirely separate question factually, which is why I
5 made a distinction in looking at those cases that
6 plaintiff cites, 21 of which the majority of them are
7 federal question CAFA removals. And a small handful,
8 four, are actually removals on the basis of
9 jurisdiction legally and factually that is at issue
10 in this case.

11 Then plaintiff's counsel went on to say
12 that, well, aha, the 200 number is totally bogus,
13 because all of the cases in the MDL are -- or some
14 substantial number of them, I guess impliedly, are
15 these cases where the distributors have argued that
16 manufacturers should be severed; and then she went on
17 to say that the severance argument in the context of
18 opioid litigation originated with the distributors
19 making this argument against the manufacturers.

20 Both of those things are untrue I know with
21 respect to the latter, because Endo, assisted by
22 Arnold & Porter, was, to my knowledge, the first
23 defendant of any kind in opioid litigation to even
24 raise Rule 19 and 21 severance as a basis to remove
25 opioid cases. Though I can't provide to you with

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1 absolute certainty a number today, I am almost
2 certain that none of the cases before Judge Polster
3 were removed on a severance theory that was
4 predicated on a distributor argument -- that were
5 transferred to Judge Polster, i.e., currently pending
6 before Judge Polster -- where the distributors
7 suggested that the manufacturer should be severed.
8 The only state I'm aware of that happening in is
9 Texas, because one of the manufacturers there, the
10 relationship between the parties works out such that
11 if you could sever one of the manufacturers, you
12 could create diverse jurisdiction.

13 So I'm not even aware of that argument,
14 that particular flavor of this argument being made
15 anywhere outside of the state of Texas. I guess I
16 could be wrong about that, but I certainly know that
17 it's the case that the majority of those 204 cases
18 currently pending before Judge Polster are cases in
19 which manufacturers or distributors have argued for
20 severance of tertiary defendants, i.e., defendants
21 that are not manufacturers, distributors, or
22 pharmacies.

23 THE COURT: Doctors.

24 MR. PUIG: Doctors, right. Physician
25 assistants. In some cases I think, like, drug reps,

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1 other folks, but not manufacturers, distributors, or
2 retailers.

3 And again, like I said, we're going to get
4 another conditional transfer order finalized on the
5 31st of this month. And I know, because I've
6 litigated several of the cases on that CTO, that they
7 are cases removed on the basis of jurisdiction that
8 we have alleged here.

9 The last thing that I want to say, Your
10 Honor, is: On the copy-and-paste issue, I said that
11 it is a form complaint because it is a form
12 complaint. I didn't say every paragraph in the
13 complaint is identical. I think I said 95 percent or
14 something like the vast majority. And that's because
15 95 percent or the vast majority of paragraphs in the
16 complaint are copied and pasted. And to the extent
17 that this is going to move the needle for Your Honor,
18 I would be happy to send you however many of these
19 federal complaints I'm alluding to so that you can
20 undertake your own comparative review.

21 Also, Your Honor --

22 THE COURT: What is the total number of
23 cases that the Ohio judge has now in his MDL?

24 MR. PUIG: It's more than 2,400. It's more
25 than 2,400. And many of them were filed directly in

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1 federal court using the complaint that I'm alluding
2 to that is this form opioid complaint. And by the
3 way, Your Honor, I was also aware that there were
4 vestigial RICO allegations in paragraphs in the
5 complaint, and I didn't bring it up because I didn't
6 want to pile on. But the fact of the matter is that
7 this is a form complaint. They have tacked on
8 nondiversity --

9 THE COURT: Do they have a state RICO claim
10 in here?

11 MR. PUIG: No, they do not, Your Honor.

12 THE COURT: So their allegations to NMSA
13 section 30-42-3 you think are just superfluous?

14 MR. PUIG: I can tell you what their claims
15 are, Your Honor. Their claims are public nuisance,
16 negligence, negligence per se, gross negligence,
17 punitive damages, unjust enrichment, racketeering,
18 fraudulent misrepresentation, and negligent
19 misrepresentation.

20 THE COURT: Isn't the racketeering, though,
21 a state racketeering claim?

22 MR. PUIG: Oh, I may have missed that
23 connection, Your Honor. I apologize. But some of
24 the RICO allegations that are in the complaint are
25 identical to RICO allegations that were in federal

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1 complaints.

2 THE COURT: Well, but that's not uncommon.
3 I mean, that often happens where the state RICOs --
4 the same allegation satisfies both.

5 MR. PUIG: Your Honor, at minimum, I think
6 this is more of an atmospheric point that I brought
7 up to tie in what are the policy rationales for
8 procedural misjoinder.

9 But again, to the extent that this matters
10 to Your Honor, I'm happy to send along some
11 complaints for Your Honor to take a look at. The
12 thing that made me notice it was, there is a line in
13 the first paragraph that says something about a
14 corporate business plan. That's, you know, something
15 of a memorable line.

16 Unless Your Honor has any specific
17 questions for me, I have nothing else to say.

18 THE COURT: All right. Thank you,
19 Mr. Puig.

20 Any other defendant want to speak on --
21 probably we're down to the motion to stay.

22 Well, let me say this. I appreciate all
23 the hard work and arguments this afternoon, but I
24 think I'm still about where I started here. I think
25 the best course is to do nothing here and relook at

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1 this in April and see if it's been transferred. If
2 it hasn't been, then I may have some work.

3 I think somebody has got some work to do on
4 these motions to remand. I think the industry may be
5 stretching federal jurisdiction in different ways
6 with some of these removals. And I think anytime you
7 come to federal court and you want the Court to start
8 severing parties, you have and you should have an
9 uphill burden in doing that. And I guess that's sort
10 of my reaction here: I would not easily find that I
11 have federal jurisdiction. I would not easily find
12 in the other cases that I have Grable jurisdiction on
13 the defenses. It may have been the case in the
14 Balderas case.

15 So it's with some reservation that I don't
16 go ahead and reach the remand issues, but I do think
17 that the better course of MDL practice in the nation
18 and an orderly federal court suggest that I wait and
19 see if this one gets transferred. I think at some
20 point, some judge is going to have to tackle these
21 remand issues and decide whether these cases should
22 remain in federal court. I don't think that's
23 necessarily a slam dunk for the industry. I think
24 there may be some issues here. Like I said, I've
25 recognized the doctrine that the plaintiffs don't

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1 like, but I have been slow to apply it, and I think
2 federal courts should be slow to apply it because
3 joinder is broad under the Federal Rules of Civil
4 Procedure. So I think it's going to take some real
5 thought and real work to decide whether these cases
6 should remain in federal court, but I don't think
7 right at the moment I should expedite it and be the
8 one to decide it. I think that I should wait and see
9 what the MDL is going to do.

10 So I'm just not going to do anything right
11 now, and I think that's the better course for a
12 while. We'll look at it on April 1st, and if it's
13 not in Ohio, then I may have to sit down and start
14 doing some work on this case.

15 All right. Is there anything else we need
16 to discuss while we're together? Anything else I can
17 do for you? Ms. Saucer?

18 MS. SAUCER: No, Your Honor. Thank you for
19 the hearing.

20 THE COURT: All right. Thank you,
21 Ms. Saucer.

22 From the defendants?

23 MR. PUIG: No, Your Honor. Thank you.

24 THE COURT: All right. Mr. Baker?

25 MR. DOUG BAKER: Some of the defendants

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1 would like some guidance. We have some upcoming
2 deadlines to file motions to dismiss and/or answers
3 to the complaint, and I'm wondering what your ruling
4 means with regard to those upcoming deadlines.

5 THE COURT: Would the plaintiffs have any
6 objection to just holding off, you know, and not
7 requiring anything for a little bit? What do you
8 think?

9 MS. SAUCER: I think if they consented to
10 removal, then they should be bound by the rules in
11 federal court. But I will gracefully concede and let
12 them do nothing after removal.

13 MR. DOUG BAKER: Thank you, Your Honor.

14 THE COURT: Anything else from the
15 defendants?

16 All right. I appreciate your
17 presentations. Have safe trips back, and I
18 appreciate your hard work. Y'all have a good
19 weekend. I'm going to get organized up here, so
20 don't pay any attention to me.

21 (The Court stood in recess.)
22
23
24
25

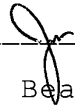
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2 STATE OF NEW MEXICO

3
4 C-E-R-T-I-F-I-C-A-T-E

5 I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
6 Official Court Reporter for the State of New Mexico,
7 do hereby certify that the foregoing pages constitute
8 a true transcript of proceedings had before the said
9 Court, held in the District of New Mexico, in the
10 matter therein stated.

11 In testimony whereof, I have hereunto set my
12 hand on this 28th day of January, 2020.

13
14 
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